RECORD, CASE NO. 15338.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 954.

IN THE MATTER OF THE APPLICATION OF GUSTAVE A. JAHN & CO., UPON CERTAIN MERCHANDISE ENTERED BY THE "ALPS," AUGUST 15, 1890 (SUIT 30).

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States circuit court of appeals for the second circuit.

In the matter of certain importations of merchandise made by Gustave A. Jahn & Co. per "Alps," August 15, 1890, suit No. 30.

An appeal in the above-entitled matter having been duly taken to this court upon the whole case from an order of the United States circuit court for the southern district of New York, reversing a decision of the board of general appraisers, which affirmed a decision of the collector of the port of New York in said matter, and said appeal having been brought on for argument at the October term, 1892, of this court, the following facts appeared from the transcript of record herein:

Statement of facts.

On the 15th day of August, 1890, the said Gustave A. Jahn & Co. imported into the port of New York by the steamer "Alps" a certain quantity of molasses for export therefrom. About the 28th day of August, 1890, the said molasses was withdrawn from warehouse and exported to the port of Montreal by way of the Central Vermont Railroad for benefit of drawback, and on said withdrawal and exportation a charge of ten cents per cask was exacted by the collector of customs at New York for
2 gauging said molasses under the provision of section 3023 Revised Statutes of the United States.

The importers above named protested against the exaction of said charge of ten cents per cask on the ground that said charge for gauging was illegal, the same having been abolished by section 22 of the "Act to simplify the laws in relation to the collection of the revenue," approved June 10, 1890.

On the 27th day of October, 1890, the board of general appraisers rendered its decision in said matter, sustaining the decision of the collector, and holding that said charge was properly exacted.

On petition duly filed by said importers an order was made by the United States circuit court directing that the proceedings had herein be returned to the United States circuit court, and the said matter was referred to George H. Sharpe, a general appraiser at this port, to take further evidence therein and duly make a return to this court. Such return having been duly made on the 6th day of January, 1892, the said matter was brought on for hearing and determination upon the whole record therein at a term of the United States circuit court, before the Hon. Hoyt H. Wheeler, district judge, when the decision of the board of general appraisers was reversed on the ground that said charge so exacted by the collector had been abolished by the act of June 10 aforesaid.

3 It also appears from the transcript of record herein that the following error was assigned by the appellant, the United States:

The court erred in reversing the decision of the board of general appraisers for the reason that the said decision of said board was final and conclusive, and the circuit court had no jurisdiction to make any degree or order in said proceeding.

The jurisdiction of the circuit court was not challenged therein, but a warrant of jurisdiction in that court was first suggested upon the hearing of the appeal here.

And now, on the foregoing statement of facts, this court certifies the question, "whether the United States circuit court had jurisdiction to hear and determine the questions of law and of fact involved in the said decisions of the board of general appraisers" to the United States Supreme Court for decision thereon pursuant to section 6 of the act entitled "An act to establish circuit court of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, in order to the proper decision of the said appeal by this court.

And this court further certifies that it has suspended any decision on the merits of the said appeal until the hearing and determination on the question of jurisdiction hereby certified to the United States Supreme Court.

WM. J. WALLACE,
E. HENRY LACOMBE,
N. SHIPMAN.

4 (Indorsed:) "A." Suit No. 30, U. S. circuit court of appeals for the second circuit. In the matter of certain importations by Gustave A. Jahn & Co., per Alps, Aug. 15, '90. Certificate of question to U. S. Supreme Court. Edward Mitchell, United States attorney, attorney for collector. United States circuit court of appeals, second circuit. Filed May 12, 1893. John A. Shields, clerk.

5 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to four, inclusive, contain a true and complete transcript of a certain statement of facts and certificate of a question by said court in the matter of the application of Gustave A. Jahn & Co., upon certain merchandise entered by the "Alps" August 15, 1890 (suit 30), as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the said United States, the one hundred and seventeenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed on cover:) U. S. circuit court of appeals, 2nd circuit. Term No. 954. In the matter of the application of Gustave A. Jahn & Co., upon certain merchandise entered by the "Alps" August 15, 1890 (suit 30). Case No. 15,338. Filed June 21, 1893.

C

O.K. 155 a.m.

1023

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals

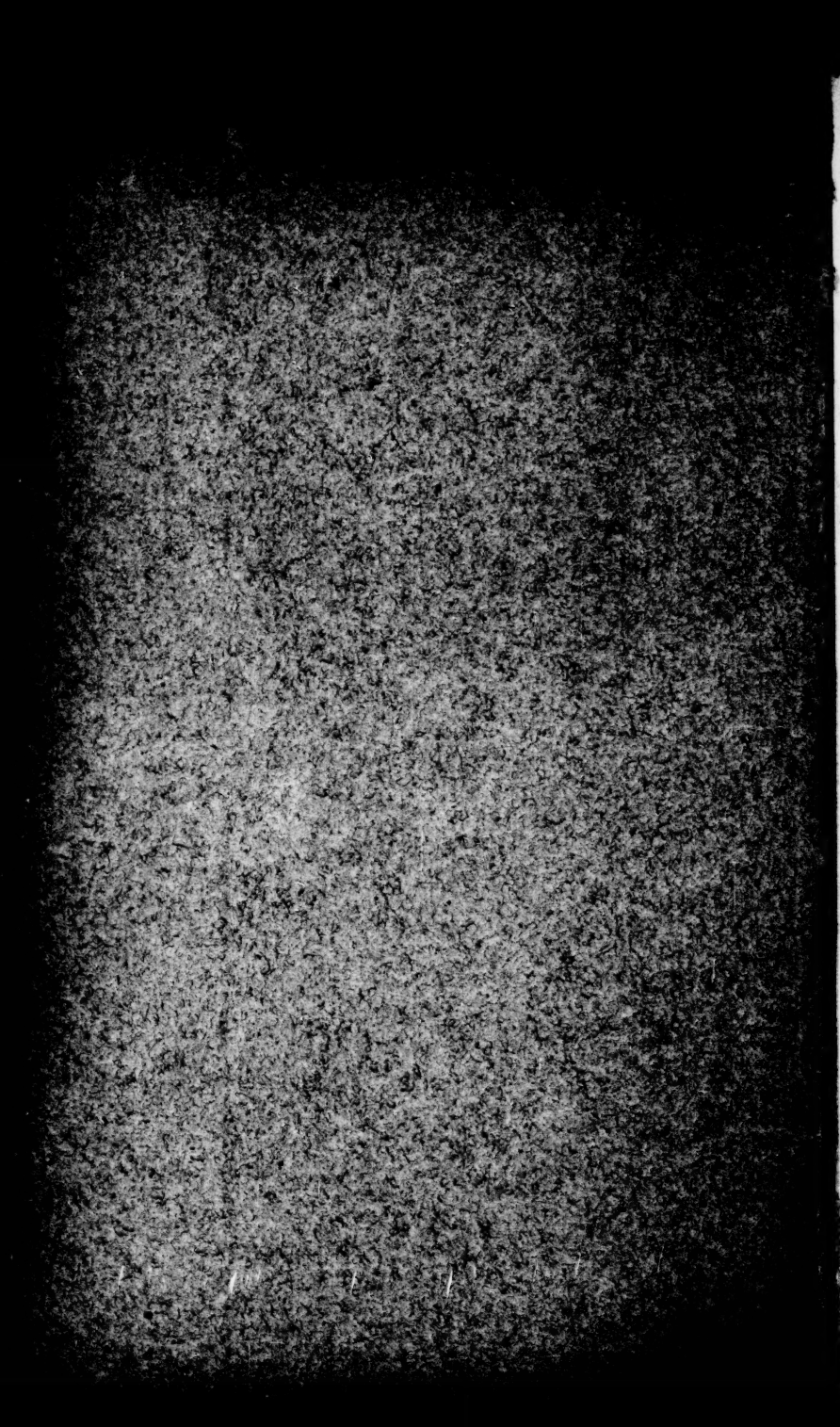
FOR THE SECOND CIRCUIT.

IN THE MATTER OF CERTAIN IMPORTATIONS OF MER-
CHANDISE MADE BY GUSTAVE A. JAHN & CO., PER
"ALPS," AUGUST 15, 1890. (No. 30.)

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 14, 1892.

Fa. 909



United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

IN THE MATTER OF CERTAIN IMPORTATIONS OF MERCHANDISE MADE BY GUSTAVE A. JAHN & CO., PER "ALPS," AUGUST 15, 1890. (No. 30.)

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1893.

.1 United States Circuit Court, Southern District of New York.

In the Matter of the Application of GUSTAVE A. JAHN & Co. upon certain merchandise entered by the "Alps" August 15, 1890. No. 30.

To the circuit court of the United States for the southern district of New York:

The petitioners above named allege that they now are and at the time hereinafter named were copartners, doing business in the city of New York, under the firm name of Gustave A. Jahn & Co.

That on or about the dates hereinafter set forth said firm entered for export at the port of New York certain merchandise, to wit, certain molasses, by the "Alps," entered August 15, 1890.

That thereafter the collector at that port proceeded to exact three cents per one hundred pounds as weighers' fees on said merchandise, which your petitioners paid.

That your petitioners being dissatisfied with the said ex-
2–5 action of weighers' fees, and within ten days after the payment thereof gave notice in writing to the collector, setting forth therein distinctly and specifically as to each entry and payment and the reasons for their objections thereto.

That thereafter the collector transmitted the invoice and all the papers and exhibits to the board of general appraisers, who thereafter and on the 30th day of October, 1890, returned that they had examined and decided as to said exaction.

That your petitioners are dissatisfied with the said decision of the said board as to the construction of the law as to the exaction of said weighers' fees, and the following is a concise statement of the errors of law complained of:

The error of law is in holding that said exaction is not illegal under section 22 of the act of June 10th, 1890, and that the provisions of section 3024 of the Revised Statutes of the United States, under which such exaction was made, *has* not been abrogated by said section 22, and such fees or exactions abolished.

Wherefore your petitioners apply for a review of the questions of law involved in the decision of said board.

GUSTAVE A. JAHN & CO.

6 The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein as ascertained by them.

They state that on the 23rd day of September, 1890, a letter dated Sept. 22, 1890, a copy of which is hereto annexed and marked Exhibit "A," was received from the collector of customs at New York, sub-

mitting under the provisions of section 14 of the act of June 10, 1890, the protest described and marked as follows (Exhibit "B"):

Collector's No.	Board No.	Protester.	Vessel.	Date of protest.
12386	401 A.	G. A. Jahn & Co.	"Alps."	August 28, '90.

7 H. E. E. J. J.

EXHIBIT "A."

CUSTOM-HOUSE, NEW YORK CITY,
COLLECTOR'S OFFICE, *Sept.* 22, 1890.

To the hon. board of U. S. gen'l appraisers, New York.

GENTLEMEN: In pursuance of the requirements of sec. 14, act of June 10, 1890, I transmit herewith the protests of Jas. Christie, No. 12589; G. A. Jahn and others, No. 12386 (401 A), from the exaction of "weighers' fees," by this office, at the rate of 3c. per 100 lbs., and from the exaction of "gaugers' fees," at the rate of 10c. per cask.

I have to state that the merchandise referred to in the respective protests was exported for benefit of drawback, and the weighers' fees of 3c. per 100 lbs. were exacted by this office under the provisions of sec. 3024, R. S., and the gaugers' fees of 10c. per cask *was* exacted under the provisions of — 3023, R. S.

Reference is made to department's circular of Sept. 11, '89, paragraph 67, last clause, which is not revoked by dept's circular of July 1, '90, S. 10094.

The export entry papers covered by the above protests are enclosed herewith.

Respectfully yours,

J. J. COUCH,
Special Deputy Collector.

(41 encl.)

A true copy.
Attest:

J. R. LAKE,
Chief Clerk.

8 EXHIBIT "B."

Chauncey C. Ryder & Co., customs int. rev. brokers & forwarding agents, No. 97 Water street.

NEW YORK, *August 28th*, 1890.

Honorable Joel B. Erhardt, collector of customs, port of New York.

SIR: We hereby protest, and intend this as such protest, against the exaction of gauging fees on our K export entry No. 1025, filed by us August 19, 1890, for the exportation of one hundred and nine puncheons molasses, to the port of Montreal by the Cent. Vermont R. R., for the reason that by the act of Congress of June 10th, 1890,

section No. 22, all fees were abolished; we pay the fees demanded to enable us to export our goods, but under this protest reserve all rights to sue for *its* recovery.

Respectfully, G. A. JAHN & CO.

That on the 27th day of October, 1890, the board of general appraisers rendered its decision in the matter of said protest No. 401 A, 12386, a copy of which is hereto annexed, marked Exhibit "C."

9 EXHIBIT "C."

393–407 A.
J. R. L.

Office of the board of U. S. general appraisers, 534 Canal street.

NEW YORK, *October 27th*, 1890.

Collector of customs, New York.

SIR: We are in receipt of your letter of the 22nd ultimo, transmitting protest described in the accompanying schedule against the exaction of alleged "fees" for weighing and gauging certain imported merchandise therein named; also for cartage and storage.

It is contended, inasmuch as section 22 of the act of June 10, 1890, abolished all "fees" upon the "entry of imported goods, and the passing thereof through the customs, and also upon all entries of domestic goods, wares and merchandise for exportation," that this section operates to repeal all authority, under former laws and regulations, to make any charge for weighing and gauging such as had been customary prior to August 1, 1890, when the new law went into effect. The new law abolishes fees and not charges. The distinction between the two is fully made in the previous decisions of this board, in the authority of which we affirm the decision of the collector in these cases (Decisions of board No. 10246, G. A. 24).

It is important in this connection to call attention to section 2920 of the Revised Statutes, which provides that "in all cases in which the invoice or entry does not contain the weight or quantity or measure of merchandise, nor weighed or measured or gauged, the same shall be weighed, gauged or measured at the expense of the owner, agent or consignee."

10 This section remains unrepealed by the act of June 10, 1890, as will be seen by reference to section 29, which enumerates all sections expressly repealed by that act. It shows that the intention of Congress is to regard charges for weighing and gauging strictly as charges and not strictly as fees, or as mere compensation to customs officers as such.

But in addition to this, all fees are not abolished by the act of June 10, 1890, but only those exacted "upon the entry" and passing of goods through the customs, whether exported or imported. The charges in the present cases can scarcely be regarded as coming within this class, whether they be considered as "fees" or not. They are actual expenses incurred either after the entry of imported

goods or prior to the entry of those exported, not upon such entry. This is the view taken by the Treasury Department in its circular of July 1, 1890, as found in Synopsis Treasury Decisions 10094.

Your decision in these cases is accordingly affirmed.

The invoices and entries received with your letter are herewith returned.

Respectfully yours, CHARLES H. HAM,
HENDERSON M. SOMERVILLE,
THAD. S. SHARRETTS,
Board of U. S. General Appraisers.

(— enclosures.)

A true copy.
Attest: J. R. LAKE,
Chief Clerk.

No.	Name of importer.	Vessel.	Date of protest.
393–12589	James Christie	"Spain"	Sept. 6, 1890.
401–12386	G. A. Jahn and others.	"Alps." (2).	Aug. 28, 1890.

A true copy.
Attest: J. R. LAKE,
Chief Clerk.

11–13 And for a certified statement of the facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits hereto attached.

HENDERSON M. SOMERVILLE,
CHARLES H. HAM,
THAD. S. SHARRETTS,
Board of U. S. General Appraisers.

14 United States Circuit Court, Southern District of New York.

In the Matter of the Application of GUSTAVE A. JAHN & Co. upon certain merchandise entered by the "Alps" August 15th, 1890. Suit No. 30.

Testimony taken before George H. Sharpe, Esq., one of the board of general appraisers, as officer of the court, in the above-entitled matter, pursuant to an order of reference made by Judge Lacombe, dated March 27th, 1891.

NEW YORK, *April 23rd*, 1891.

Appearances:

For the importers: Messrs. Stanley, Clarke & Smith.
For the collector: C. D. Baker, assistant U. S. attorney.

BENJAMIN P. CUTTER sworn and examined as a witness for the importer.

By Mr. CLARKE:

Q. What is your employment?
A. Clerk in the auditor's office, custom-house.
Q. How long have you been in the customs service?
A. In the customs service since 1872, but not in the auditor's office.
Q. Earlier than that, wasn't it—1871?
A. I came here in 1872.
Q. How long have you been in the auditor's office?
A. Since 1878; December, 1878.
Q. What is your special employment in the auditor's office?
A. In making up the pay-rolls, keeping the registers of the employees, auditing the cashier's report of fees. Those are the principal things.
Q. In the course of auditing the cashier's report as to payments made for weighing and gauging, what papers come to you? If you have a specimen of them, please produce them.
A. The account of the weigher's and gauger's office come in this shape (producing papers).
Q. In the shape here produced?
A. Yes, sir.
Q. These that you produce are actual examples?
A. Yes, sir; they have been paid and accounted for.
Q. And this is the blank upon which it is made up (handing paper to witness)?
A. Yes, sir.
Q. I ask you to annex the blank to your testimony. Will you do so—the blank that you produce?
A. Yes, sir.

Mr. Clarke offers in evidence the paper last referred to.
Objected to as incompetent and immaterial.

Q. This form you identify as "N. Y. Cat. No. 254"?
A. Yes, sir.

The paper last referred to is marked Ex. No. 1.

Q. How long has it been the practice in the custom-house to have the amounts paid for weighing and gauging returned from the cashier to the auditor's office in this manner?
A. I found that custom when I went there, in December, 1878.
Q. And continued ever since?
A. Yes, sir; and continued ever since. It is in practice now.
Q. When the cashier receives this money, what does he do with it?
A. He deposits it in the subtreasury.
Q. And is a return made by the assistant treasurer?
A. Yes, sir; he gives a certificate of deposit.

Q. Daily?
A. Yes, sir.
Q. Have you one of those with you?
A. Yes, sir.
Q. That is the certificate of deposit for April 22nd (handing paper to witness)?
A. That is the form.
Q. Is this the copy or an original?
A. That is a triplicate that belongs in the auditor's office.
Q. This is one of the certificates returned to the custom-house by the assistant treasurer for deposit of April 22, 1891?
A. Yes, sir.
Q. Under what head?
A. Those are the deposits of April 21, but the certificate is dated April 22.
Q. Under what head were the payments for weighing and gauging stated in that return to the assistant treasurer? Read it.
A. Weighing and gauging fees.
Q. How long has such returns been made and received at the custom-house?
A. Ever since I have been there; since 1878.
Q. You found them in use at that time?
A. Yes, sir; no change.

The return referred to is made on form No. 274 of the assistant treasurer's office.

(No cross-examination.)

17 Ex. 1, Apr. 23, 1891. G. J. C.

N. Y. cat. No. 254.

Custom-house, New York.

Pay to cashier.

Fees for Weighing and Gauging.

Exporter: ——.
Vessel: ——.
Article: ——.
Quantity: ——, at — cts., $—.
Date: ——.

T.

W. E. Peirce sworn and examined as a witness for the importer.

By Mr. Clarke:

Q. You are employed in the custom-house?
A. Yes, sir.
Q. In what capacity?
A. I have charge of the internal-revenue drawbacks and exportations under the internal-revenue law.

Q. In what bureau are you?
A. I am in the eighth division; drawback division.
Q. How long have you been in that division?
A. Four years.
Q. And prior to that time?
A. Prior to that time I was in other divisions.
18 Q. This Ex. 1, the blank now shown you——
A. I took that out of my drawer before coming up.
Q. That is in use in the custom-house?
A. Yes, sir.
Q. For how long a time to your knowledge?
A. To my knowledge I have been using them for four years.
Q. Do you have anything to do in the course of your employment with such papers?
A. Yes, sir.
Q. What do you do in respect to such blanks?
A. Those I make out myself I fill out in duplicate, stating the name of the exporter, the vessel, and the article, and the amount.
Q. State the amount; what amount do you state?
A. Those that I make out are for gaugers' fees; ten cents a cask.
Q. Do you know about the filling up?
A. It is done in the bureaus; see them made out.
Q. And the amount for weighing is how much?
A. Tree cents for one hundred pounds.
Q. When those blanks are filled out, what is done with them?
A. Taken down to the cashier.
Q. And the amount stated is paid the cashier?
A. To the cashier.
Q. Can the entry be liquidated and the drawback paid until those amounts entered on the slips like that have been paid to the cashier?
A. No, sir.

(No cross-examination.)

JOHN C. SAGE sworn and examined as a witness for the importer.

By Mr. CLARKE:

Q. You are employed in the custom-house?
A. Yes, sir.
Q. The office of the naval officer?
A. Yes, sir.
Q. For how long a time?
A. Nineteen years nearly.
Q. In what capacity?
A. At present as chief clerk of the drawback division.
19 Q. And for how long?
A. I cannot tell you just how long, but ever since the division was organized. I was in charge of the drawback bureau before it became a bureau, and have since been in charge of the division.

Q. You have been in charge of the drawback bureau for many years?

A. For eighteen years.

Q. I hand you Ex. 1 and ask you if you know a paper like that in use in the custom-house, and if so, how long?

A. I recognize that paper as one which accompanies drawback entries. It is made out in the collector's office; the amount of the weighers' fees or gaugers' fees is entered on this paper; it comes with the drawback entry to the naval office. We there examine it to see if the correct fee is charged.

Q. And for how long has that been the practice?

A. I think since I have been in charge of the bureau and division.

Q. You recognize that paper, or one similar to it, as being in use all that time?

A. I recognize that form.

Cross-examination by Mr. BAKER:

Q. What kind of drawbacks are you familiar with in your division?

A. Well, at present we have three kinds: drawback on foreign merchandise exported from custody of customs officials in the condition as imported; and drawback on domestic manufactures; drawback on material used in the manufacture of domestic merchandise; and drawback on salt used in curing meats exported.

Q. That was true in August, 1890, was it?

A. Yes, sir.

Mr. Clarke reads in evidence from the Treasury regulations and from synopsis of decisions of the Secretary as follows:

Treasury Regulations of 1857.

Art. 596. Fees for weighing, gauging, or measuring imports, under the provision in the 4th section of the tariff act of 1846, it has been decided by the courts of the United States, can be legally exacted of the importer only in cases where the invoice or entry shall not contain the weight, or quantity, or measure of the merchandise weighed, gauged, or measured.

Art. 597. Fees for weighing, gauging, or measuring goods withdrawn from warehouse, in quantities less than the entire importation, to be paid by the importer, as will be seen by reference to article 541 of these regulations.

Treasury Regulations of 1874.

Art. 1168. Table of custom-house fees for all ports on the sea coast, gulf and interior waters of the United States.

Par. 34. Weighing of weighable articles exported, upon which a drawback or return duty is allowed, or withdrawn from bonded warehouse for export, per 100 pounds, .03.

Par. 37. Weighing of other weighable articles in the districts of Boston, New York, Philadelphia and Baltimore, per 112 lbs., .01¼.

Par. 38. Weighing of other weighable articles in the district of Norfolk, .02¼.

Par. 39. Weighing of other articles in all other districts, .03.

Par. 40. Gauging of gaugeable articles exported, upon which drawback or return duty is allowed, and gauging of goods withdrawn from bonded warehouse for export, per cask, .10.

Par. 75. If weighable goods exported, three cents per hundred pounds for weighing; and if gaugeable goods exported, ten cents per cask for gauging.

Like fees to the foregoing should be collected upon goods exported under internal-revenue laws.

21 Art. 1170. Fees for weighing, gauging, or measuring imports will be charged in all cases where the invoice or entry shall not contain the weight, quantity, or measure of the merchandise weighed, gauged or measured; and whenever the weighing, gauging or measuring shall disclose a difference between the actual weight or quantity and that specified in the invoice or entry, affording a well-grounded presumption of fraud, the collector will advise with the district attorney of the United States in regard to the case, and will be governed by his opinion as to the propriety of instituting legal proceedings for enforcing the penalty provided by law.

Fees for weighing, gauging, or measuring goods withdrawn from warehouse in quantities less than the entire importation are to be paid by the importer, at the rates prescribed by law. The actual expense incurred is not to be taken into consideration.

Art. 1172. Collectors, naval officers, and surveyors are required to have posted in a public place in their offices a fair table of the fees demandable by law at their ports, subject at all times to inspection, and to give receipts for fees collected, specifying the particulars, whenever required to do so. Failure to observe these requirements entails a penalty of one hundred ($100) dollars, for the benefit of the informer.

Art. 737.

Par. 6. All railroad iron withdrawn for export is to be deemed weighable merchandise, subject to weighers' fees, at the rate of three cents per hundred pounds, to be paid by the owners.

Heading, chapter II, art. 1169.

Table of custom-house fees to be collected at ports and places on the northern, northeastern, and northwestern frontiers of the United States.

22 Par. 37. Weighing of weighable articles withdrawn from bonded warehouse for export, per 100 lbs., .03.

Par. 40. Weighing of other weighable articles, per one hundred and twelve pounds, .03.

Weighers' fees are not to be collected, unless weighing is necessary to determine dutiable value; and goods entered for immediate exportation, and not actually deposited in warehouse, are exempt from such fees.

Par. 41. Gauging of gaugeable articles exported, or withdrawn from warehouse for exportation, per cask, .10.

Fees not applicable to goods exported in cases.

Par. 42. Gauging of other articles:

Casks, each, .12.

Cases and baskets containing wines and distilled spirits, each, .04½.

Treasury Regulations of 1884.

Heading, art. 1523.

Custom-house fees and penalties.

Par. 36. Where weighing, gauging, or measuring is necessary to ascertain dutiable value of goods imported, or withdrawn from warehouse, the actual expense incurred will be collected. R. S., 2920.

Par. 37. Weighing of weighable articles exported, upon which a drawback or return duty is allowed, or withdrawn from bonded warehouse for export, per 100 pounds, R. S., 3024, to be accounted for to the Treasury as miscellaneous customs receipts, .03.

Par. 38. Gauging of gaugeable articles exported upon which
23 drawback or return duty is allowed, and gauging of goods withdrawn from bonded warehouse for export, per cask, R. S., 3023, .10.

Art. 1524.

Par. 38. Weighing of weighable articles withdrawn from bonded warehouse for export, per 100 lbs., R. S., 3024, .03.

Par. 39. Where weighing, gauging or measuring is necessary to ascertain dutiable value of goods imported or withdrawn from warehouse, the actual expense incurred will be collected, except in the case of wine, dutiable according to value. R. S., 2920.

Par. 40. Gauging of gaugeable articles exported, or withdrawn from warehouse for exportation, per cask, R. S., 3023, .10.

Fee is not applicable to goods exported in cases.

Art. 917. All such railroad iron withdrawn for export is to be deemed weighable merchandise, subject to weighers' fees, at the rate of three cents per hundred pounds, to be paid by the owner or shipper. Weighers' returns must be made by customs weighers in the manner required in the case of other weighable merchandise.

Art. 980. It not being necessary to weigh flour so shipped and marked, at the port of exportation, to determine the quantity on which drawback is to be allowed, the fee prescribed by section 3024 of the Revised Statutes will not be exacted. *Ibid.*

Synopsis of Decisions, 1873.

1446.

Weighing fees on goods exported on which return duty is allowed.

Under the first section of the act of July 26, 1866, three (3) cents per hundred pounds should be received for weighing dutiable merchandise, except when it is entered for immediate exportation, but not, as in this case, when entered for warehouse to be withdrawn for consumption, transportation, or exportation, at the option of the importer. The law is explicit; on all weighable articles exported, upon which a drawback or return duty is allowed, and upon all weighable goods withdrawn from bonded warehouse for export, there should be levied and collected the fees above named, to be determined by the returns of the weighers.

24

(Letter to Messrs. Wm. Ruperti & Co., New Orleans, March 7, 1873. Navigation division.)

1564.

Fee for weighing articles of export.

The collection of a fee, under the provisions of the act of July 26, 1866, of 3 cents per 100 pounds upon the gross weight of the articles exported is correct.

(Letter to collector, New York, May 26, 1873. Navigation division.)

Synopsis of Decisions, 1874.

1966.

Employment of weighers and gaugers.

As the Revised Statutes make no provision for the payment from fees of officers of customs employed at a compensation not exceeding $1,500 per annum in weighing, gauging and measuring merchandise, collectors of customs are directed, from and after June 22, 1874, to pay such officers as inspectors of customs a *per diem* compensation for services actually rendered by them equal to that which they have heretofore received from fees. This order is not to change the official duties of such weighers, gaugers and measurers, nor to affect in any manner the principal weighers, whose compensation is fixed by special provisions of law.

(Letter to collector, Charleston, October 2, 1874.)

25 1980.

Weighers' Fees.

No provision having been made in the Revised Statutes of the United States for the payment of fees to weighers, gaugers, and measurers, all such payments made on and after that date will be disallowed.

Application should be made to the Secretary of the Treasury for authority to employ inspectors as weighers, gaugers, and measurers, and to pay the necessary expenses incurred in handling the merchandise weighed, gauged, or measured. (Circular commissioner of customs, October 27, 1874.)

2016.

Fees for Weighing Merchandise.

TREASURY DEPARTMENT, *November* 20, 1874.

SIR: Your letter of November 10 is received, asking authority to pay the necessary expense of weighing, gauging, &c., at your port.

All such expenses are still to be charged against merchandise not duly entered by weight on invoice or transportation bond, the fees previously charged being still charged and received, but accounted for as miscellaneous receipts from customs. Such necessary labor as you may employ should be paid under an estimate, forwarded as soon as practicable, for any month in which it may occur.

I am, very respectfully,

CHAS. F. CONANT,
Acting Secretary.

Collector of customs, Salem, Mass.

26 *Synopsis of Decisions for* 1879.

3854.

Exportation for drawback—gaugers' fees.

TREASURY DEPARTMENT, *January* 17, 1879.

SIR: Your letter of the 13th instant is received, in which you return, with a report thereon, the protest of J. D. Warner, on behalf of Messrs. Havemeyers & Elder, against the action of your office in charging gaugers' fees on exportation, under section 3019, Revised Statutes, of syrups in five-gallon tin cans, packed in cases of two cans each. The only authority of law for exacting fees for gauging goods exported under said section appears to be contained in section 3023, Revised Statutes, the text of which is as follows: "Upon all merchandise gaugeable by law, hereafter exported, upon which drawback or return duty is allowed * * * there shall be collected by the collectors of the several ports, ten cents per cask."

A cask may be large or small—it is not a specific measure of quantity. Therefore the department decides that said fee of ten cents per cask is not applicable to goods put up in anything but casks.

Very respectfully,

JOHN SHERMAN, *Secretary.*

Collector of customs, New York.

4088.

Fees for Weighing Goods Withdrawn from Warehouse.

TREASURY DEPARTMENT, *July* 10, 1879.

SIR: The department is in receipt of your letter of the 5th instant, submitting the United States weigher's return of sixty cases
27 of glycerine, imported by Messrs. Geisenheimer & Co. per bark "Friehandle."

The weigher's return showing considerable increase over the invoice weight, and it being impossible to ascertain the actual expense of weighing the goods, you inquire whether such expense may not be estimated at 3 cents per hundred pounds, that being the rate provided by section 3024, Revised Statutes, in the case of weighable goods exported.

Paragraph 83 of department circular of September 1, 1875, provides that fees for weighing, measuring, and gauging goods withdrawn from warehouse, in quantities less than the entire importation, are to be paid by the importer at the rate prescribed in said circular.

In paragraph 37, the rate for weighing weighable articles in the district of New York is stated to be 1⅞ cents per 112 pounds. This rule applies with equal force on withdrawals, whether the invoice by which entry is made contains the weights or not. The department is of opinion that the fee prescribed for weighing goods on withdrawal in quantities less than the entire importation should apply to the original weighing, where the invoice does not specify the weight.

You will take action accordingly.

The weigher's return is enclosed herewith.

Very respectfully,

By order: H. F. FRENCH,
Assistant Secretary.

Collector of customs, New York.

5013.

Fees—Weighing on Railroad Iron Exported from Constructive Warehouse.

TREASURY DEPARTMENT, *September* 14, 1881.

SIR: I am in receipt of your letter of the 5th instant,
28 asking the department for instructions as to the exaction of

weighing fees of three cents per one hundred pounds on certain railroad iron and steel in bars, and iron bolts and spikes, intended to be exported to Mexico in bond.

It appears from your statement that the iron and steel rails in question were entered at your port for warehouse; but, as you have no warehouse, they were placed, by the authority of the department, in an open space, in charge of an inspector. The rails were weighed on arrival, in order to verify the invoice, but no charge was made therefor; and, in your opinion, the weighing fees should now be collected, notwithstanding the rails were not actually deposited in warehouse.

You are informed that the department sees no force in the technical objection to the payment of weighing fees, on the ground that the rails were not deposited in warehouse, as they were in charge of the proper customs officer. The owner of the rails should, therefore, pay the weighing fee of three cents per one hundred pounds on withdrawing them for export to Mexico, and you are directed to exact it.

Very respectfully, H. F. FRENCH,
Assistant Secretary.

Collector of customs, Corpus Christi, Texas.

Synopsis of Decisions of 1882.

5171.

Iron—weighing fees.

TREASURY DEPARTMENT, *March* 30, 1882.

SIR: I am in receipt of your letter of the 24th instant, enclosing the protest and appeal of the Louisiana National bank against
29 your exaction of weighing fees at the rate of 3 cents per 122 pounds on certain iron rails entered for warehouse, a portion of the importation having been withdrawn for consumption, and the remainder for transportation and exportation to Mexico.

You state that the invoice did not specify the lengths of the rails, and that a portion of the rails having been withdrawn for consumption, and another portion for exportation, weighing was necessary to determine the dutiable quantity covered by each withdrawal, the fees for which were exacted under paragraph 39 of the list of customhouse fees of 1875.

You further say that your practice is governed by department circular of March 2, 1882, and the actual expense incurred for weighing iron is exacted when the dutiable weight is required to be ascertained under section 2930, Revised Statutes, and article 1134, customs regulations.

You are informed that the principles governing your action in the classes of cases mentioned may be thus expressed: Goods that are withdrawn from warehouse in less quantities than the original

importation for transportation only or for consumption, follow section 2920, Revised Statutes, if they need to be weighed, as is stated in department circular of March 2, 1882, in regard to salt. But if salt or railroad iron be withdrawn from warehouse for export, a fee of 3 cents per 100 pounds must be paid in accordance with section 3024, Revised Statutes.

Very respectfully, H. F. FRENCH,
Acting Secretary.

Collector of customs, New Orleans, La.

5602.

Fees—goods withdrawn from warehouse for export.

TREASURY DEPARTMENT, *March* 3, 1883.

SIR: In reply to your letter of the 16th ultimo, you are informed that section 3024, Revised Statutes, provides that upon all weighable merchandise withdrawn from bonded warehouse for export, there shall be collected three cents per hundred pounds, to be determined by the returns of the weighers, and that the department holds that said fee is to be collected in all cases where such goods are withdrawn for export, whether weighing is thought to be necessary or not.

Very respectfully, H. F. FRENCH,
Acting Secretary.

Collector of customs, San Francisco, Cal.

5824.

Fees—Weighable Goods Withdrawn from Warehouse for Export.

TREASURY DEPARTMENT, *July* 18, 1883.

SIR: Your letter of the 12th instant is received, reporting further upon the protest and appeal of Messrs. Norton & Bell against your action in exacting fees at the rate of three cents per hundred pounds, under section 3024, Revised Statutes, upon the withdrawal from warehouse for exportation to Mexico of 2,161 steel rails, said fees amounting to $352.62.

The grounds of the appeal are (1) that the entire importation of steel rails was withdrawn, and (2) that no actual weighing took place at the time of withdrawal for exportation. Article
31 1132, Customs Regulations, relied on by the appellants to sustain their first point, does not apply to the fees fixed by section 3024, Revised Statutes, which must be collected upon all weighable goods withdrawn from warehouse for export, but does apply to the expense of weighing imported goods where the weight is not specified in the invoice (see section 2920, Revised Statutes);

and it appears that in this case the rails were weighed upon importation, and were counted on withdrawal, and a return of their weight made upon the former weights as found.

In view of these facts, your decision is affirmed, and you will so inform the appellants.

Very respectfully, CHAS. J. FOLGER, *Secretary.*

Collector of customs, New Orleans, La.

Synopsis of Decisions for 1885.

6723.

Fees—gaugeable goods exported in casks with benefit of drawback.

TREASURY DEPARTMENT, *January* 16, 1885.

SIR: Your letter of the 19th ultimo is received, submitting two protests and two appeals of George A. Moore against your action in exacting a fee of 10 cents per cask upon certain casks of sirup, made from imported sugar, exported per American steamer "George W. Elder," with benefit of drawback, under section 3023, Revised Statutes.

The ground for the appeals is stated to be that these casks or kegs contain each exactly five gallons of sirup, and that no gaugers' fees are exacted upon sirup exported for drawback in tin cans containing five gallons each, and the appellants refer to printed decision 3854, January 17, 1879.

32 Section 3023, Revised Statutes, requires the collection of a fee of 10 cents per cask upon all merchandise gaugeable by law, exported for benefit of drawback, and the very point of printed decision 3854 was that the sirup in that case was not exported in casks, and that section 3023, Revised Statutes, did not, therefore, apply to it.

In view of the facts, your decision is affirmed, and you will so notify the appellants.

Very respectfully, CHARLES E. COON,
Acting Secretary.

Collector of customs, San Francisco, Cal.

7078.

Fees—Weighing of Goods Withdrawn from Warehouse for Exportation.

TREASURY DEPARTMENT, *August* 15, 1885.

SIR: Your letter of the 12th instant is received, submitting the protest and appeal of Messrs. Willett, Hamlin & Co. against your action in exacting weighing fees at the rate of 3 cents per hundred pounds (amount not given) upon certain sugar withdrawn from warehouse and exported, viz., July 9, 1885, per steamer "Miranda," and schooner "Rob & Harry;" July 13, 1885, per schooner "D. W. B.;" and July 17, 1885, per schooner "Adeline;" in all, 32,640 mats.

The fees were paid upon the entries made on July 9, 1885, while the protest was not made until July 14, 1885; and as more than ten days elapsed between the two dates, the case does not fall within the provisions of section 2932, Revised Statutes, but does come within those of section 26, act of June 26, 1884.

Section 3024, Revised Statutes, under which the fees were exacted, provides that upon all "weighable articles hereafter exported, upon which a drawback or return duty is allowed, and upon all
33 weighable articles withdrawn from bonded warehouses for export, there shall be collected * * * 3 cents per hundred punds, to be determined by the returns of the weighers."

The language is plain and mandatory, and the fact urged by the appellants, that the goods were not actually weighed at the time of exportation, does not affect its directions as to the assessment and collection of this charge, provided it was determined by the returns of the weighers made, upon actual weighing done by them, which is presumed to be the case here.

Under the circumstances, the appeal is rejected, and you will so notify the appellants.

Very respectfully, C. S. FAIRCHILD,
Acting Secretary.

Collector of customs, New York.

7105.

Fees—Weighing on Goods Withdrawn from Bond for Export.

TREASURY DEPARTMENT, *September* 7, 1885.

SIR: Your letter of the 2d instant is received, submitting the protest and appeal of Messrs. Edward T. Russell & Co. from your action in exacting fees at the rate of 3 cents per hundred pounds, under section 3024, Revised Statutes, upon 25 barrels of mackerel withdrawn from warehouse for exportation, per bring "Anglo," on the 28th ultimo.

The provisions of section 2932, Revised Statutes, have been complied with.

The ground of the appeal is, that these goods are bought and sold by the barrel, and are not "weighable goods" in the general acceptation of that term. The tariff law, however, imposes a specific duty of 1 cent per pound (T. I., new, 277) upon them, and as
34 this make weighing such goods upon importation necessary, they are "weighable goods" within the meaning of section 3024, Revised Statutes.

The term "weighable goods," as used in said section, must be taken to mean goods which must be weighed on importation for the purpose of levying duties, and as the mackerel in question are such goods, the appeal is rejected.

Please notify the appellants of the decision.

Very respectfully, DANIEL MANNING, *Secretary.*

Collector of customs, Boston, Mass.

Synopsis of Decisions for 1886.

7340.

Fees for weighing dried and pickled fish withdrawn from bonded warehouse for exportation.

TREASURY DEPARTMENT, *January* 29, 1886.

SIR: Your letter of the 25th instant submits the protests and appeals of Messrs. F. Woodruff & Co. from your decision in exacting a fee of three cents per one hundred pounds in twenty-five cases of the withdrawal from bonded warehouses for exportation of certain dried and pickled fish, during the months of October, November and December, 1885.

The grounds of the appeal in each case are, that "weighers' fees cannot be" legally charged, as no extra weighing is "done by the Government; that the only weighing that was done on the importation was a test of about 1 to 2 per cent., and at a very small expense to the Government."

Your action in assessing and exacting the fees complained
35 of appears to have been based upon the provisions of section 3024, Revised Statutes, as well as article 1523 of the Revised Customs Regulations of 1884, thereunder, prescribing "custom-house fees and penalties."

The language of the statute is clear and positive, and admits of no doubt as to its intent and meaning; neither does it grant Government officials any discretion to waive its enforcement in any case.

If the weighers made a return, the fees attached.

The department, therefore, decides that the fees in each of these cases were legally exacted by you, and the several appeals of the Messrs. Woodruff & Co. are accordingly rejected.

You will please furnish a copy of this decision to the appellants.

Respectfully yours, C. S. FAIRCHILD,
Assistant Secretary.

Collector of customs, New York.

Synopsis of Decisions for 1888.

9030.

So-called "gaugers' fees" properly exacted on exportations of domestic spirits in bond.

TREASURY DEPARTMENT, *September* 18, 1888.

SIR: The department is in receipt of your letter of the 27th ultimo, relative to the protest of Mr. H. B. Mayhew against the exaction of gauger fees at the rate of 10 cents per cask, on domestic spirits exported in bond.

Mr. Mayhew claims that section 3023 of the Revised Statutes, imposing a fee of 10 cents per cask upon all merchandise gaugeable by law, "withdrawn from bonded warehouses for export," is not applicable to other than imported merchandise, and he
36 alleges that exaction of such fees upon domestic spirits is an innovation.

By reference to article 998 of the General Regulations and the free-list of November 23, 1886 (Cat. 400, page 9), it appears that the fees prescribed on export entries of imported merchandise, including the gaugers' fee of 10 cents per cask of gaugeable goods, must be collected upon exportation of goods under internal-revenue acts.

The collector of customs at New York reports, under date of the 12th instant, that the practice established at his port in the respect mentioned is to charge a gauger's fee of 10 cents per cask. (See par. 17, page 4, Cat. 400.) Your action in bringing the practice of your office into harmony with the existing regulations is therefore hereby approved.

Respectfully yours, I. H. MAYNARD,
Assistant Secretary.

Collector of customs, San Francisco, Cal.

Synopsis of Decisions of 1889.

9758.

Weighers' fees—when they accrue.

TREASURY DEPARTMENT, *December* 5, 1889.

SIR: The department is in receipt of your letter of the 22d of October last, relative to the non-exaction of weighers' fees at your port on certain ore arriving from Mexico for immediate exportation.

You state that in not collecting such fees you follow the custom and practice at your port, which has been to neither weigh nor exact weighers' fees on such shipments; that the ore, consisting of copper and silver, arrives at your port in locked and sealed cars,
and is transferred directly from the same to the foreign-bound
37 vessel without going into bonded warehouse, and that the entry and subsequent proceedings are under article 748 and following of the Customs Regulations of 1884.

It does not appear from your statemont whether the importations in question arrive at your port under consular seal, as authorized by synopsis 5031, or whether they arrive from the frontier port under transportation entries.

In the former case, the ore arriving in cars with consular seals intact may properly be entered for immediate exportation without appraisement and weighing, under article 783 and following of the general regulations. In such case, no weighers' fees mentioned in section 3024, Revised Statutes, which contemplates official returns of weighers, should be exacted. In the latter case, the ore can be entered for rewarehouse and immediate exportation under the

articles of the regulations cited by you, and must be weighed either at the frontier port on entry for transportation, or at your port on entry for rewarehouse and exportation; and the said fees accrue.

You will adjust the practice accordingly.

Respectfully yours,

GEORGE C. TICHENOR,
Assistant Secretary.

Collector of customs, Galveston, Texas.

9887.

Fee on Weighable Articles Prescribed by Section 3024, Revised Statutes, to be Collected at Port of Exportation.

TREASURY DEPARTMENT, *February* 27, 1890.

SIR: The department is in receipt of your letter of the 20th instant, transmitting six protests of Mr. James J. Haynes, against your exaction of weighers' fees on certain copper and lead ores, entered at the port of Laredo in your district, for warehouse and
38 transportation to Galveston, on January 8, 18, 23, 25, 29 and 30, 1890, respectively.

You state that the appellant claims that it is not necessary to make a separate appeal in each case, because his appeal, No. 7143*c*, submitted with your letter of the 15th ultimo, involves the same question as to the legality of such exaction.

In view of the provisions of section 2932 of the Revised Statutes, your decision as to the exaction of weighers' fees on the six importations specified above is final and conclusive against all persons interested therein, no appeals having been actually taken from said decision.

The department therefore declines to take any action on the said six protests, and the same are herewith returned.

As to the appeal submitted with your letter of the 15th ultimo, it appears that it relates to an importation of certain 641 bars of lead into the port of Laredo, where the merchandise was entered on the 31st of December last, for warehouse and transportation to Galveston, Tex., whence it was intended to be finally exported, and that a weighers' fee of 3 cents per 100 pounds, provided for in section 3024, Revised Statutes, was exacted by you.

The appellant claims that such exaction, amounting to $18.60, was not warranted by the law referred to (section 3024, Revised Statutes), which provides for weighers' fee of 3 cents per 100 pounds upon "all weighable merchandise withdrawn from bonded warehouses for export."

From your reference to department's decision of December 5, 1889 (synopsis 9758), it would seem that your action in collecting weighers' fees in this case was based upon a misapprehension of the true intent of said decision, which was to the effect that weighers' fees, under section 3024 of the Revised Statutes, accrue at the port

of exportation, whether the merchandise was weighed at the frontier port of entry or at the port of exit.

39 As the lead in question was withdrawn from warehouse (constructively) in your district for transportation, and not for exportation, the appeal appears to be well taken, and you are therefore hereby authorized to take the necessary steps for a refund of the weighers' fees exacted in error.

Respectfully yours,

GEORGE C. TICHENOR,
Assistant Secretary.

Collector of customs, Corpus Christi, Tex.

(7143*x*.)

Counsel for the collector objects to all of the above papers as incompetent, immaterial and irrelevant.

Counsel for the importers also reads in evidence the report of Surveyor Wakeman to the Secretary of the Treasury in 1865, as follows:

"The earnings of the weighers represent the amount of fees originally chargeable by law for weighing and measuring merchandise, and are placed to their credit for the purpose of determining the maximum of their compensation under the act of July 7, 1838, and subsequent acts."

Counsel for the collector objects to the last-named paper as incompetent, immaterial, and irrelevant.

Counsel for the collector reads in evidence Treasury regulations and Synopsis of Treasury Decisions, as follows:

Article 8, *Treasury Regulations, Issued August* 7, 1890.

"Art. 8 (Regulations 316 and 317). All invoices must be

40 made out in a clear and legible manner, and on firm and durable paper. They must be made out in the weights and measures of the country whence imported, and must exhibit the actual weight, measure, or quantity of the goods, without respect to the weights and measures of the United States."

Also article 27 of same regulations, as follows:

"Art. 27. The act of June 10, 1890, abolishes all fees exacted and oaths administered by officers of the customs, except as provided in this act, upon the entry of imported goods and the passing thereof through the customs, and provides for certain declarations in lieu of such oaths. No fees will hereafter be collected upon the entry or exportation of merchandise, except such as may be prescribed by the Secretary of the Treasury. (See circulars July 1 and August 16, 1890.)"

Also Synopsis Treasury Decisions, 10094, dated July 1, 1890, as follows:

(10094.)

Circular—Fees Abolished—Regulations Regarding Compensation in Lieu of Fees.

TREASURY DEPARTMENT, *July* 1, 1890.

To collectors of customs and others:

The act of June 10, 1890, abolishes on and after August 1, 1890, all fees exacted upon the entry of imported goods, and the passing thereof through the customs, and also upon all entries of domestic goods, wares and merchandise for exportation.

Officers of the customs whose compensation under existing laws is made up wholly or in part from such fees will receive under the act a "fixed sum for each year equal to the amount which they would have been entitled to receive as fees for such services during said year."

Commencing with the first proximo, every such officer will
41 keep an accurate record of such services in his office; and a detailed report thereof, setting forth the services performed, and the amount that would have been due therefor under the laws prescribing fees, will be made out at the end of each month, and forwarded to the First Auditor of the Treasury with the officer's accounts.

Forms for the detailed reports and for certificates to be given by the officers will be furnished by the department on requisition.

The act cited abolishes the following fees authorized by the department's circular (Cat. No. 400) of September 11, 1889, relating to the sea-coast, viz:

Paragraph.		
28.	Report and entry of foreign goods imported in fishing vessels, under permit to touch and trade	$0 25
31.	Permit to land or deliver goods, baggage, or equipment of vessel	20
33.	Permit to lade goods for exportation, entitled to drawback	30
34.	Debenture	20
44.	Permits.	
47.	Permits.	
49.	Entry of merchandise for immediate consumption on arrival:	
	Permit to land	20
	Bond, if any	40
50.	Warehouse entry:	
	Permit to warehouse	20
	Warehousing bond	40
51.	Withdrawal entry for consumption at port of original importation:	
	Permit	20
	Penal bond, if required, 40 cents additional.	

Paragraph.

42 52. Withdrawal entry for consumption at a port other than that of original importation:
Fees same as in preceding paragraph.

53. Withdrawal entry at the port of importation for transportation in the United States:
Transportation bond $0 40
Permit or order to load 20
Certificate to copy of invoice 20

54. Withdrawal entry for transportation in the United States, at a port other than that of original importation:
Fees same as in preceding paragraph.

55. Rewarehousing entry:
Permit to warehouse 20
Rewarehousing bond 40
Certificate to cancel transportation bond 20

56. Rewarehousing withdrawal entry for exportation:
Bond to export 40

57. Rewarehousing and withdrawal entry for consumption:
Penal bond 40
Permit to deliver 20
Certificate to cancel bond 20

58. Rewarehouse and immediate withdrawal entry for exportation:
Export bond 40
Certificate to cancel bond 20

59. Entry for warehouse and immediate transportation in the United States:
Bond 40
Permit or order to load 20
Certificate to copy of invoice 20

43 60. Export entry from port of original importation:
Export bond 40

61. Warehouse and immediate exportation entry:
Export bond 40

62. Withdrawal entry for transportation and exportation in bond to Mexico:
Bond to transport and export 40
Certificate to copy of invoice, if required 20

63. Entry for transportation and exportation in bond to Mexico (S., 5033):
Bond to transport and export 40

64. Entry for immediate transportation and exportation in bond to Canada:
Bond to transport and export 40
Permit to land 20

65. Withdrawal entry from warehouse for transportation and exportation in bond to Canada:
Bond to transport and export 40

66. Entry for immediate transportation of unappraised merchandise in bond:
Permit to land 20

Paragraph.

67. Export entry from warehouse for benefit of drawback:
    Export bond $0 40
    Order to load 30
    Debenture certificate 20
68. Export entry of manufactured articles for drawback:
    Export bond 40
    Debenture certificate 20
    Order on surveyor to ship 30
44 69. Transportation entry for exportation for drawback:
    Bond 40
    Permit to order to load (Reg's, Cat. No. 400, Nov. 23, 1886) 20
    Debenture certificate 20
    At the port of arrival there will be charged:
    For order on surveyor to ship for exportation 30
    For certificate of exportation 20

(The like fees to the foregoing, charged upon the exportation of domestic merchandise under the internal-revenue laws, are also abolished.)

70. Withdrawal entry of imported articles for transfer to manufacturing warehouse:
    Manufacturers' bond 40
    Transfer order 20
    Transfer permit 20

The act also abolishes the following fees authorized by department's circular (Cat. No. 401) of September 4, 1889, relating to the northern frontiers, viz:

Paragraph.

30. For a permit to land or deliver goods not included in any entry $0 20
32. For a permit or order to load goods for exportation for benefit of drawback 30
33. For a debenture 20
36. For entry of goods, wares, and merchandise for consumption, warehouse, or rewarehouse transportation or exportation, including oath and permit to land or deliver the same 50
45 41. Permits.
    44. Permits.
45. Entry of goods, less than $100 in value, imported in vehicles other than railroad cars and boats of less than five tons:
    Entry of goods 50
46. Entry of merchandise for immediate consumption on arrival:
    Entry, including permit to land 50

Paragraph.

47. Warehouse entry:
    Entry, including oath and permit to land..... $0 50
    Warehousing bond..... 50
48. Withdrawal entry for consumption at port of original importation:
    Entry, including permit to deliver..... 50
49. Withdrawal entry for consumption at a port other than that of original importation:
    Entry, including oath and permit to deliver..... 50
50. Withdrawal entry for transportation in the United States, at the port of original importation:
    Entry, including oath and permits..... 50
    Bond..... 50
51. Withdrawal entry for transportation in the United States, at a port other than that of original importation: (Fees same as in case of withdrawal entry for transportation at the port of original importation.)
52. Rewarehousing entry:
    Entry, including oaths and permits..... 50
    Bond..... 50
    Certificate to cancel bond..... 20
46 53. Rewarehouse withdrawal entry for exportation:
    Entry, including oath and permit to deliver... 50
    Bond..... 50
54. Rewarehousing and withdrawal entry for consumption:
    Combined rewarehousing and withdrawal entry (two entries), including oaths and permits..... 1 00
    Certificate to cancel bond..... 20
55. Entry for rewarehouse and withdrawal for immediate exportation:
    Combined warehouse and withdrawal entry (two entries), including oath and permit to deliver.... 1 00
    Export bond..... 50
    Certificate to cancel transportation bond..... 20
56. Entry for warehouse and immediate transportation in the United States (Form 152, Cus. Regs.):
    Combined warehouse and withdrawal entry (two entries), including oaths and permits..... 1 00
    Bond..... 50
57. Export entry from port of original importation (Form 164, Cus. Regs.):
    Entry, including oath and permit to deliver..... 50
    Bond..... 50
58. Warehouse and exportation entry:
    Combined warehouse and withdrawal entry, including oaths and permit to deliver..... 1 00
    Bond to export..... 50

Paragraph.		
47	59. Withdrawal entry for transportation and exportation in bond to Mexico:	
	Combined transportation and export entry, including oath and permit	$1 00
	Bond to export	50
	60. Entry for immediate transportation and exportation in bond to Canada, etc.:	
	Combined entry, including oath and permit	1 00
	Bond to export	50
	61. Withdrawal entry from warehouse for transportation and exportation in bond to Canada, etc.:	
	Combined transportation and export entry, including oath and permit	1 00
	Bond to transport and export	50
	62. Entry for immediate transportation of unappraised merchandise:	
	Entry, including oath and permit	50
	63. Export entry from warehouse for benefit of drawback:	
	Entry, including oath and permit to deliver	50
	Bond to export	50
	Debenture certificate	20
	Permit or order to load	30
	64. Export entry of manufactured articles for drawback:	
	Entry	50
	Bond to export	50
	Debenture certificate	50
	Permit or order to load	30
	65. Transportation entry for exportation for drawback:	
	Entry	50
	Bond	50
	Debenture certificate	20
48	At port of arrival there will be charged:	
	For order on surveyor to ship for exportation	30
	For certificate of exportation, if required	20

(The like fees to the foregoing, charged upon the exportation of domestic merchandise under the internal-revenue laws, are also abolished.)

WILLIAM WINDOM, *Secretary.*

(*Forms Mentioned Above.*)

(Cat. No. 153*b*.)

(To be rendered to the First Auditor with each emolument account.)

Dstailed report of official services rendered by me, which are chargeable to the United States in lieu of fees, under the act of June 10, 1890.

(*Department Circular No.* 51 *of* 1890.)

Services rendered by —— ——, collector of customs, district of ——, for the month of ——, 18—:

Date.	Nature of service.	Amount.

I, —— ——, collector of customs for the district of ——, swear that the foregoing is a true statement of all official services rendered by me which are chargeable to the United States in lieu of fees, under the act of June 10, 1890, for the term stated, and that no services are herein reported except such as have been actually rendered, and that the amount charged is in accordance with law.

49

Subscribed and sworn to before me this — day of ——, 18—.

[SEAL.] —— ——, *Collector.*

(Cat. No. 154*b*.)

Send the numbers used to the commissioner of customs, Washington, D. C., by mail, at the expiration of each month.

See that this is countersigned by the persons receiving service.

—— ——.

(*Department Circular No.* 51, *Series of* 1890.)

Fees charged under the act of June 10, 1890.

. . . . . .

. . . . . .

. . . . . .

. . . . . .

I hereby certify that the above-described service, as noted, has been performed.

Service rendered.

—— ——, *Collector.*

Countersigned: —— ——, *Payer.*

50 Also section 3023 of the Revised Statutes of the United States.

Also article 706 of the General Regulations under the Customs and Navigation Laws of 1884 as follows:

"Art. 706. And goods shall not be delivered from bonded warehouse or public store unless the permit has indorsed thereon the name of the warehouse in which the goods are stored, or upon which the same is drawn; the date of receipt of the goods in store, as per return of the storekeeper, and the word "deliver," together with the date of such indorsement, and the signature or initials of the clerk in charge of the storage books at the custom-house, to show that he has entered the permit in his books; also, the further indorsement of the cashier, as evidence that the custom-house charges are paid."

Also article 708 of the General Regulations under the Customs and Navigation Laws of 1884 as follows:

"Art. 708. When goods are withdrawn from warehouse in quantities less than the entire importation, the expense of weighing, gauging, or measuring must be paid by the owner, importer, or agent, if it be necessary to weigh, gauge, or measure such portions in order to ascertain the dutiable value."

Also the first paragraph of article 709 of the General Regulations under the Customs and Navigation Laws of 1884 as follows:

"Art. 709. Merchandise in bulk, liquors, sugars, molasses, cocoa, pepper, and other articles bought and sold by weight, gauge, or measure, when withdrawn for export or transportation, must be entered for such destination at the actual quantities ascertained at the time of arrival in the United States; and to secure this,
51 weighers, measurers, and gaugers will be required to mark on each package its contents as determined by them on its entry for warehouse. R. S., 2980."

Also paragraphs 15, 16 and 17 of catalogue No. 400 of Treasury Department, dated 1886, as follows:

"15. Where weighing, gauging, or measuring is necessary to ascertain dutiable value of goods imported or withdrawn from warehouse, the actual expense incurred will be collected.

"16. Weighing of weighable articles exported, upon which a drawback or return duty is allowed, or withdrawn from bonded warehouse for export, per 100 pounds, .03.

"17. Gauging of gaugeable articles exported, upon which drawback or return duty is allowed, and gauging of goods withdrawn from bonded warehouse for export, per cask, .10.

(Fee not applicable to goods exported in cases.)

Also paragraphs numbered from 59 to 70, both inclusive, of

Synopsis of Treasury Decisions, No. 9607, dated September 11, 1889, as follows:

59. Entry for warehouse and immediate transportation in the United States:
    Bond $0 40
    Permit or order to load 20
    Certificate to copy of invoice 20
60. Export entry from port of original importation:
    Export bond 40
61. Warehouse and immediate exportation entry:
    Export bond 40
62. Withdrawal entry for transportation and exportation in bond to Mexico:
    Bond to transport and export 40
    Certificate to copy of invoice, if required 20
52 63. Entry for transportation and exportation in bond to Mexico (S., 5033):
    Bond to transport and export 40
64. Entry for immediate transportation and exportation in bond to Canada:
    Bond to transport and export 40
    Permit to land 20
65. Withdrawal entry from warehouse for transportation and exportation in bond to Canada:
    Bond to transport and export 40
66. Entry for immediate transportation of unappraised merchandise in bond:
    Permit to land 20
67. Export entry from warehouse for benefit of drawback:
    Export bond 40
    Order to load 30
    Debenture certificate 20

    (If weighable goods exported, 3 cents per hundred pounds for weighing, and if gaugeable goods exported, 10 cents per cask for gauging.)

68. Export entry of manufactured articles for drawback:
    Export bond 40
    Debenture certificate 20
    Order on surveyor to ship 30
69. Transportation entry for exportation for drawback:
    Bond 40
    Permit or order to load (Reg's, Cat. No. 400, Nov. 23, 1886) 20
    Debenture certificate 20
53 At the port of arrival there will be charged:
    For order on surveyor to ship for exportation 30
    For certificate of exportation 20

    (Like fees to the foregoing should be charged on exportation of goods under internal-revenue acts.)

70. Withdrawal entry of imported articles for transfer to manufacturing warehouse:

Manufacturer's bond	$0 40
Transfer order	20
Transfer permit	20

Also Synopsis of Treasury Decisions, No. 10246, G. A. 24, dated September 13, 1890, as follows:

Objected to as being a decision made since the controversy here arose.

(10246, G. A. 24.)

Weighers' Fees.

NEW YORK, *September* 13, 1890.

SIR: We are in receipt of your letter of the 23d ultimo, transmitting the protest described in the accompanying schedule against your action in exacting so-called weighers' fees, under section 3024 of the Revised Statutes, on exportations of sugar, ice, and pig-iron in the vessels named, the contention of the protestants being that section 3024 of the Revised Statutes is repealed by the act of June 10, 1890

Section 3024, under which the exaction complained of was made, provides that "upon all weighable articles hereafter exported, upon which a drawback or return duty is allowed, and upon all weighable merchandise withdrawn from bonded warehouses
54 for export, there shall be collected by the collectors of the several ports 3 cents per 100 pounds, to be determined by the returns of the weigher."

The designation of the exactions under this section as "weighers' fees" is a misnomer, inasmuch as the amount does not go to the weigher and is not a charge for weighing.

Fees and charges are distinct from each other, both in the Revised Statutes and in the act of June 10, 1890. Fees are compensatory for official services, while charges are for care, custody, storage, lighterage, cartage, etc., and they involve expenses, disbursements, etc.

In the late act, while section 22 abolishes all fees upon the entry of imported goods, and upon the entries of domestic goods for exportation, the abolition does not apply to charges to which the goods may be or may become subjected, and what are called weighers' fees in these protests belong to the latter class, which were not abolished by the late act.

They were properly exacted by you, and your action is accordingly sustained.

Collector of customs, San Francisco, Cal.

Counsel for the importers offers, in respect to Synopsis of Treasury Decisions No. 9607 of 1889, the heading of said decision No. 9607, as follows:

(9607.)

Circular—Custom-house Fees on the Sea-coast, Gulf, and Western Rivers.

TREASURY DEPARTMENT, *September* 11, 1889.

To collector- of customs and others:

The following fees, when for services performed by customs officers on the sea-coast, Gulf and Western rivers, or for the masters or owners of vessels of the United States, except those navi-
55 gating the waters of the northern, northeastern and northwestern frontiers, otherwise than by sea, are not to be collected; but at ports where the officers are paid wholly or partly by fees are to be included in a detailed report of services, and submitted to the department with the officer's accounts, viz:

Also the line immediately following paragraph No. 25 of decision No. 9607, as follows:

"The following fees are collectible from the private persons concerned."

Also the two lines immediately preceding paragraph No. 44 of said last-named decision, as follows:

"To ascertain whether the fees mentioned below are payable by the private persons concerned, reference must be made to the lists printed above."

Paragraph 59 to 70, both inclusive, of decision No. 9607, are already in evidence, as appears on pages 47 and 48 of the minutes, without any other heading.

Adjourned.

56 *In Re* GUSTAVE JAHN *et al.*

Hearing resumed, June 10, 1891.

JAMES H. JENKINS, sworn and examined as a witness for the collector.

By Mr. BAKER:

Q. What is your present occupation?

A. Chief clerk of the cashier's department, New York custom-house.

Q. How long have you been chief clerk in the cashier's department?

A. Since 1882.

Q. Are you familiar with the method of conducting business in that office?

A. That has been in my entire charge.

Q. Will you look at Collector's Exhibit A. Have you seen that blank before, or blanks similar to it?

A. Yes.

Q. Are those blanks used in the cashier's department in the custom-house?
A. They are.
Q. And have been ever since you have been there?
A. Ever since I have been there.
Q. And are still in use?
A. And are still in use daily.

(Paper referred to is offered in evidence and marked Collector's Exhibit A of this date.)

Q. Do you recognize that paper?
A. I do.
Q. Is that a blank in use in the custom-house department?
A. It is.
Q. And has been ever since you have been in that office?
A. Not ever since; no, sir. These we had in 1889, and we
57 had a similar one before that that was not printed, and we used to have them written out every day. The printed form was in 1889.
Q. Was the written form that was used before 1889 similar to that as regards the items?
A. Exactly.
Q. And the statement contained in that blank?
A. Yes, sir.
Q. That is the blank that is now in use and has been since 1889?
A. Yes, sir.

(Paper referred to is offered in evidence and marked Collector's Exhibit B of this date.)

Q. Will you look at the blank I now show you?
A. I recognize this as one of our blanks.
Q. That has been in use in that office since you have been there?
A. That has been used for the last six years.
Q. And is now in use?
A. Is now daily used.

(Said paper is offered in evidence and marked Collector's Exhibit C of this date.)

Q. Please state what this blank is.
A. This is a blank used in our department, and has been ever since I have been connected with the service.
Q. And is now in use?
A. Is now in use.

(Said paper is offered in evidence and marked Collector's Exhibit D of this date.)

Q. Will you state what Exhibit D is used for, for what purpose?
A. When the daily receipts are summarized under their specific headings, then this blank is made up with the various amounts to be deposited in the subtreasury and accompanies the amount of

money which I send to the subtreasury every morning; that is, all the miscellaneous moneys outside of duties and outside of customs that come into the office.

Q. That is the cashier's daily report?

A. That is the cashier's daily report.

Adjourned.

58 *In Re* GUSTAVE JAHN *et al.* 30 to 44.

Hearing resumed June 12, 1891.

JAMES H. JENKINS continuing, testifies:

Cross-examination by Mr. CLARKE:

Q. Exhibit A, N. Y. catalogue No. 220, produced by you the other day, is filled out in the cashier's office; is it not? (Handing paper.)

A. Yes, sir.

Q. And that contains a statement of daily receipts for the various matters included within it?

A. Yes, sir; for all that is included there.

Q. Is it made up from other papers?

A. It is made up from the original data; that is, made up at the shipping desk.

Q. Under the head of weighers and gaugers, what is entered there?

A. Just the amount of the weighers' and gaugers' tickets as they come in from the different brokers.

Q. That is the amount according to the regulation for weighing goods which they weigh?

A. Yes, sir.

Q. And those amounts are paid on the tickets?

A. They are paid on those little tickets.

Q. And then entered upon that paper?

A. Yes, sir, in gross.

Q. The gross amount of the days' tickets that have been received in the cashier's office?

A. Yes, sir.

Q. I show you Exhibit B, No. 238*a*; who fills up that paper?

A. We have four receivers at the four windows, and each of them has a slip of this kind and each of them receive these specific sort of accounts during the day; they are summarized from their
59 books and given to me to make up the general summary on these tickets.

Q. These are summarized by you and put on Exhibit C, No. 226?

A. Yes, sir.

Q. After Exhibits A, B and C are filled up, what is done with them?

A. A copy is sent to the naval office and a copy to the auditor.

Q. Of which?

A. Of that statement.

Q. Of Exhibit C?

A. Yes, sir; this is a summary of all the moneys which go into the cashier's office for that day.

Q. Exhibit B, what is done with that?

A. They are destroyed after I get the data; they are simply memoranda.

Q. And Exhibit A?

A. They are filed away for future use, because they contain matters pertaining to shipping.

Q. They are filed away in the cashier's office?

A. Yes, sir.

Q. And the original of Exhibit C?

A. That one copy goes to the auditor and one to the naval officer.

Q. And the original, what is done with that?

A. That is kept in my own set of books, under the specific heads.

Q. You entered it in a book?

A. Yes, sir; that is a memoranda copy sent to the other office, so that our accounts will prove at the end of the day.

Q. Exhibit C is simply a blank which is made out from a book kept in the cashier's office?

A. Yes, sir.

Q. Exhibit D, No. 235, what is that filled up from?

A. The deposit certificate of money, which I send to the subtreasury each day.

Q. And it is filled up from what?

A. From the data that I get from these various memoranda.

Q. From the other three exhibits?

A. Yes, sir; after I have entered them in the specific heads in the cashier's books, then it is collated and sent there to be distributed among the several accounts.

Q. And this Exhibit D accompanies the deposit of the money received?

A. Yes, sir.

60 Q. As shown by those other three exhibits?

A. Yes, sir; and in addition to that, that is for the miscellaneous matters, imports and withdrawal duties and penal duties, they are on different certificates entirely. That is the collation of all duties, miscellaneous and everything.

Q. Then Exhibit C is a collation of all the receipts of the cashier's office for the day?

A. Yes, sir; of every nature.

Q. Exhibit D accompanies only the amounts that are set forth in Exhibit C?

A. From tonnage duties down.

Q. From tonnage duties you say?

A. Yes, sir.

Q. Inclusive of tonnage dues?

A. Yes, sir; it is dues there, but it comes in the duty list separate from the others; it includes tonnage dues.

Q. I want to be clear about this. Exhibit D is made out to accompany the deposit in the subtreasury of every receipt that is set forth in Exhibit C, except those that are included in the items import duties, withdrawal duties and penal duties?

A. Yes, sir, that is clear.

Testimony closed.

(Endorsed:) U. S. circuit court. Filed June 25, 1891. John A. Shields, clerk.

61 *In Re* GUSTAVE A. JAHN & Co. No. 30. January 7, 1892.

Decision.

WHEELER, *J.:*

In the matter of this appeal of Gustave A. Jahn, as to the charge of so much per hundred pounds for weighers' services on goods entered for exportation, the appeal is against the allowance of those charges, on the ground that by the act of 1883 they were abolished. Now, the first time that any charge was made on that account for any goods entered for exportation was in the act of 1866, 14th Statutes, page 289. That was an act by itself, consisting of three sections, the first of which is: "That upon all weighable articles hereafter exported, upon which a drawback or returned duty is allowed, and upon all weighable goods withdrawn from bonded warehouse for export, there shall be levied and collected, by the collectors of the several ports, three cents per hundred pounds, to be determined by the returns of the weighers."

And by section 2:

"That the office of measurer at the port of New York is hereby abolished, and the duties heretofore performed by them shall be performed by the weighers."

And section 3 is:

"That the weighers at the port of New York shall receive from and after the passage of this act, an annual salary of twenty-five hundred dollars: Provided that the increase of compensation
62 over and above the present salary of said officers, shall not exceed, in any fiscal year, the amount of fees earned by them."

Now this charge is connected right in there under the term "fees." The charge is a fee for a weigher, provided for by this act for the first time.

Now as to the gaugers, a similar thing is provided by the act of 1867, 14th Statutes, page 470, in the tariff act at large, section 3:

"That upon all merchandise gaugeable by law hereafter exported, upon which drawback or return duty is allowed, and upon all goods gaugeable by law, withdrawn from bonded warehouses for export, there shall be levied and collected by the collectors of the several ports, ten cents per cask."

Then section 4:

"That the gaugers at the port of New York shall receive, from and after the first day of April, eighteen hundred and sixty-seven,

an annual salary of two thousand dollars: Provided that the amount of compensation of said officers, as hereby established, shall not exceed in any fiscal year the amount of fees earned by them."

Thus the charges of gaugers on exportations are put in here for the first time and are called fees.

Now these two sections, sec. 1, of the act of 1866, and sec. 3, of the act of 1867, are brought forward into the Revised Statutes in sections 3023 and 3024, exactly as they were enacted then. The other sections have become useless, so they are not brought forward into the statutes. But when these laws were passed these were fees. The dropping out of those sections does not change them at all, although the word "fees" is lost out by the revision of the statutes into the Revised Statutes. The only question is whether they are fees now. Well, they are a specific charge for a specific thing, not relating to the actual worth of the things done, as for a
63 *quantum meruit*. But whether worth so much or not, they are to have so much a hundred pounds for weighing, and so much a cask for gauging, and that is essentially a thing that comes under the name of fees, although in this statute it is not called a fee.

Now, the act of 1890, section 22, provides:

"That all fees exacted and oaths administered by officers of the customs, except as provided in this act, under or by virtue of existing laws of the United States, upon the entry of imported goods and the passing thereof through the customs, and also upon all entries of domestic goods, wares, and merchandise for exportations, be, and the same are hereby abolished."

The point here is whether that abolishes these fees. Now it is argued that these are not included because they are not called fees in the statute. But the point is not whether they are called fees in the statutes; the point is whether they are fees within the meaning of this act, this section 22 of the act of 1890. Now Congress did not content itself by abolishing the particular sections or the law relating to fees, and leaving the rest as it was; but they declared emphatically that all fees exacted by customs officers in passing goods through the custom-house, or passing them through the other way, shall be abolished; that is, the whole thing was cut up by the roots so that the goods passed through without any charge for fees. Here was a thing exacted. The collector of the port exacted three cents on a hundred pounds of sugar entered by these appellants for exportation. The appraisers held that those two sections of the Revised Statutes were not repealed, so far as this was concerned. But I think Congress meant to repeal that and cut it all out, and leave the goods free, so that there should be nothing in the nature of fees charged or exacted by an officer in passing goods
64 through the custom-house, either way, and that the appellants were entitled to have this sugar go through without this charge. Therefore, I decide that this charge, as a charge or fees, was improperly made.

I have looked into the case of Oberteufer *vs.* Robertson, 116 U. S.,

499, as to charges. In that case all charges are abolished, just as in this case all fees were abolished. There they said all charges were cut right out, no matter where expressed in the statute; after that they were gone.

The decision of the appraisers is reversed.

(Endorsed:) A. 30. U. S. circuit court. Filed Feb. 12, 1892. John A. Shields, clerk.

65 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States circuit court rooms, in the post-office building, in the city of New York, on the 12th day of January, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Hoyt H. Wheeler, judge.

In the Matter of the Application of GUSTAVE A. JAHN & Co. upon Certain Merchandise Entered by the "Alps" August 15th, 1890. No. 30.

The above matter having come on for hearing and determination before this court on the 6th day of January, 1892, on the application of Gustave A. Jahn & Co., on the record and proceedings herein, and on the return of the board of general appraisers of the record and the evidence taken by them, with their certified statement of the facts involved therein, together with their decision thereon:

Now, after hearing Stephen G. Clarke, Esq., on behalf of Gustave A. Jahn & Co., and Charles D. Baker, Esq., assistant U. S. district attorney, in opposition thereto, and due consideration having been had,

66 It is ordered, adjudged and decreed, that the exactions by the collector from the appellants herein were for "fees," and that the decision of the board of appraisers, affirming the decision of the collector of the port herein, be and the same hereby is reversed.

HOYT H. WHEELER.

67 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of the Application of GUSTAVE A. JAHN & Co. upon Certain Merchandise Entered by the "Alps" August 15, 1890. "A" 30.

Assignment of Error.

Afterwards, to wit, on the 9th day of February, 1892, before the judges of the United States circuit court of appeals, for the second circuit, at the post-office building in the city of New York, comes Joel B. Erhardt, collector, appellant, by Edward Mitchell, U. S. attorney, his attorney, and says: That in the record and proceedings aforesaid there is manifest error in this, to wit:

First. It appears by the record that the circuit court erred in reversing the decision of the board of general appraisers in this application.

Second. That the circuit court erred in holding that the charges for weighing and gauging the merchandise in question were not chargeable against said merchandise, on the ground that said charges had been abolished by law, when charged and collected by the collector of customs.

Third. That the circuit court erred in reversing the said
68 & 69 decision of the board of general appraisers, so far as the same held said charges leviable and collectible on said merchandise, on the ground that the decision of said board as to said charges was final and conclusive, and the circuit court had no jurisdiction to make any decree or render any judgment relating thereto.

And the said appellant, the collector of customs at the port of New York, prays that said judgment may be reversed, annulled and altogether held for naught.

EDWARD MITCHELL,
U. S. Attorney, for Appellant.

70 United States Circuit Court, Southern District of New York.

In the Matter of the Application of GUSTAVE A. JAHN & Co. upon Certain Merchandise Entered by the "Alps" August 15, 1890. Suit No. 30.

Please take notice, that the undersigned, on behalf of the collector of the port of New York, and on the part of the United States, hereby appeals from the decision of this court, rendered herein, and entered on the 12th day of January, 1892, to the United States circuit court of appeals, for the second circuit.

Dated, New York, February 9th, 1892.

Yours, &c., EDWARD MITCHELL,
U. S. District Attorney for the Southern District of N. Y., Room 50, Post-office Building, New York City.

To Stanley, Clarke & Smith, Esqs., attorneys for importers, and John A. Shields, clerk.

71 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of the Application of GUSTAVE A. JAHN & Co. upon Certain Merchandise Entered by the "Alps" August 15, 1890. Suit No. 30.

To the United States circuit court of appeals for the second circuit:

The Attorney General of the United States hereby applies for the allowance of an appeal to the United States circuit court of appeals,

for the second circuit, from the decision and judgment of the U. S. circuit court, rendered herein, on the 12th day of January, 1892.

Dated, February 9th, 1892.

W. H. H. MILLER,
Attorney General,
By EDW'D MITCHELL,
U. S. Att'y.

72 & 73 The foregoing application is granted and appeal allowed.

Dated, New York, February 9th, 1892.

E. H. LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

74 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the foregoing pages, numbered from one to eighty-four inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the matter of the application of Gustave A. Jahn & Co., concerning certain merchandise entered by the "Alps," August 15, 1890, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said [SEAL.] court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fifth day of March, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the said United States the one hundred and sixteenth.

JOHN A. SHIELDS, *Clerk.*

75 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of Certain Importations of Merchandise Made by GUSTAVE A. JAHN & Co., per "Alps," August 15, 1890. Suit No. 30.

An appeal in the above-entitled matter having been duly taken to this court upon the whole case from an order of the United States circuit court for the southern district of New York reversing a decision of the board of general appraisers, which affirmed a decision of the collector of the port of New York in said matter, and said appeal having been brought on for argument at the October term, 1892, of this court, the following facts appeared from the transcript of record herein:

Statement of Facts.

On the 15th day of August, 1890, the said Gustave A. Jahn & Co. imported into the port of New York by the steamer "Alps" a certain quantity of molasses for export therefrom. About the 28th day of August, 1890, the said molasses was withdrawn from warehouse and exported to the port of Montreal by way of the Central Vermont

railroad for benefit of drawback, and on said withdrawal and exportation a charge of ten cents per cask was exacted by the collector of customs at New York for gauging said molasses under the
76 provision of section 3023 Revised Statutes of the United States.

The importers above named protested against the exaction of said charge of ten cents per cask on the ground that said charge for gauging was illegal, the same having been abolished by section 22 of the "act to simplify the laws in relation to the collection of the revenue," approved June 10, 1890.

On the 27th day of October, 1890, the board of general appraisers rendered its decision in said matter, sustaining the decision of the collector and holding that said charge was properly exacted.

On petition duly filed by said importers an order was made by the United States circuit court directing that the proceedings had herein be returned to the United States circuit court, and the said matter was referred to George H. Sharpe, a general appraiser at this port, to take further evidence therein and duly make a return to this court. Such return having been duly made on the 6th day of January, 1892, the said matter was brought on for hearing and determination upon the whole record therein at a term of the United States circuit court, before the Hon. Hoyt H. Wheeler, district judge, when the decision of the board of general appraisers was reversed on the ground that said charge so exacted by the collector had been abolished by the act of June 10 aforesaid.

It also appeared from the transcript of record herein that the following error was assigned by the appellant, The United States:
77 & 78 The court erred in reversing the decision of the board of general appraisers for the reason that the said decision of said board was final and conclusive, and the circuit court had no jurisdiction to make any decree or order in said proceeding.

The jurisdiction of the circuit court was not challenged therein, but a want of jurisdiction in that court was first suggested upon the hearing of the appeal here.

And now, on the foregoing statement of facts, this court certifies the question whether the United States circuit court had jurisdiction to hear and determine the questions of law and of fact involved in the said decision of the board of general appraisers to the United States Supreme Court for decision thereon pursuant to section 6 of the act entitled "An act to establish circuit court of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, in order to the proper decision of the said appeal by this court.

And this court further certifies that it has supended any decision on the merits of the said appeal until the hearing and determination of the question of jurisdiction hereby certified to the United States Supreme Court.

WM. J. WALLACE.
E. HENRY LACOMBE.
N. SHIPMAN.

79 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to 78, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of certain importations of merchandise made by Gustave A. Jahn & Co., per "Alps," August 15, 1890, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 24th day of August, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the said United States the one hundred and eighteenth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

JOHN A. SHIELDS, *Clerk.*

80 Supreme Court of the United States, October Term, 1893.

GUSTAVE A. JAHN and WILLIAM J. GRIFFITHS, Petitioners, etc.,
against
THE UNITED STATES. } No. —.

To the Attorney General of the United States:

You will please take notice that it is the purpose of the petitioners (G. A. Jahn & Co.) to omit in printing the below-indicated portions of the record below as entirely immaterial upon the present petition and not at all affecting any issue or question heard or determined in the courts below, to wit:.

(1.) The indorsement of filing upon the petition and application to the United States circuit court. (See page 2 of the printed case below.)

(2.) The bond (and indorsements thereon) given upon such application. (*Ibid.*, pp. 3 & 4.)

(3.) That court's order to the board of general appraisers. (*Ibid.*, whole of p. 5.)

(4.) The caption to that board's return. (*Ibid.*, p. 6.)

(5.) Indorsement upon petitioners' protest. (*Ibid.*, p. 8.)

(6.) Indorsement upon "Exhibit C." (*Ibid.*, p. 11.)

(7.) Order of reference and indorsement. (*Ibid.*, p. 12.)

(8.) General Appraiser Sharpe's return. (*Ibid.*, p. 13.)

(9.) Indorsement upon Judge Wheeler's decision. (*Ibid.*, p. 66.)

(10.) Indorsement upon assignment of error. (*Ibid.*, p. 68.)

(11.) Joinder in error and indorsement thereon. (*Ibid.*, p. 69, whole.)

(12.) Indorsement upon notice of appeal. (*Ibid.*, pp. 70 and 71.)

(13.) Indorsement upon application for appeal. (*Ibid.*, p. 72.)

(14.) Citation and indorsement thereon. (*Ibid.*, p. 73.)

(15.) Indorsement of filing upon the statement of question certified by the circuit court of appeals to the Supreme Court of
81 the United States. (Transcript of record below, MSS. p. 78.)

If you dissent from any of the foregoing omissions you will please to indicate such of the matter above mentioned as you desire to have printed.

Washington, September 7th, 1893.

EDWIN B. SMITH,
Of Counsel for the Petitioners.

An examination of the papers convinces me that the parts mentioned in this notice are in no way necessary to the presentation or consideration of the questions involved, and consent is therefore hereby expressed to their omission on the part of the United States.

LAWRENCE MAXWELL, JR.,
Solicitor General.

155-109

SUPREME COURT
JAMES H. MCKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

IN THE MATTER OF THE APPLICATION of Gustave A. Jahn & Co. upon certain merchandise entered by the Alps, August 15, 1890. (Suit 30.) } No. 541.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

IN THE MATTER OF THE APPLICATION of Gustave A. Jahn & Co. upon certain merchandise entered by the Alps, August 15, 1890. (Suit 30.) } No. 541.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case grows out of an importation, on August 15, 1890, by Gustave A. Jahn & Co., into the port of New York, of certain molasses for export therefrom. About August 28, 1890, the molasses was withdrawn from warehouse and exported to the port of Montreal for benefit of drawback. On the withdrawal and exportation the collector of customs at New York exacted a charge of ten cents per cask for gauging the molasses, under the provisions of the Revised Statutes, § 3023.

The importers protested against the charge for gauging, claiming that it had been abolished by section 22 of the

act entitled "An act to simplify the laws in relation to the collection of the revenues," approved June 10, 1890, c. 407, 26 Stat., 131. On October 27 the Board of General Appraisers rendered its decision sustaining the action of the collector, holding that the gauging charge was properly exacted. The importers appealed to the circuit court of the United States for the southern district of New York, under the customs administrative act of June 10, 1890. The circuit court reversed the decision of the Board of General Appraisers, holding that the gauging charge exacted by the collector had been abolished by the act of June 10, 1890. Thereupon the United States appealed to the circuit court of appeals, assigning for error that the circuit court erred in reversing the decision of the Board of General Appraisers, for the reason that the decision of the Board was final and conclusive, and that the circuit court had no jurisdiction to make any decree or order in said proceeding. The circuit court of appeals has certified to this court the following question, to wit (Record 2):

> Whether the United States circuit court had jurisdiction to hear and determine the questions of law and fact involved in the said decision of the Board of General Apppraisers.

The decision of the court in *United States* vs. *Klingenberg*, 153 U. S., 93, seems to cover the case and to require that the question certified by the circuit court of appeals should be answered in the affirmative. In delivering the opinion in that case Mr. Justice Jackson said (p. 102):

> Now, by section 14 of the act [customs administrative act of June 10, 1890], if the decision of the collector imposes an excessive amount of duties, *under*

> *an improper construction of the law*, the importer may take an appeal to the board of general appraisers, whose decision on such questions is not made conclusive as it is in respect to the *dutiable value* of the merchandise, and not being conclusive, it is subject to review under the express provisions of section 15.

Again on page 104:

> Under a proper construction of sections 14 and 15 of the act of June 10, 1890, it can not be held that the right of review by the circuit court is limited and confined, as contended by the appellee, to the two subjects of classification and the rate of duty. By section 14 the collector's decision on rate and amount of duties, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), may be the subject of appeal to the Board of General Appraisers. *The subjects of review by the circuit court, provided for by section 15, extend to all questions of law and fact in respect to which the Board of General Appraisers have appellate jurisdiction, except the decision of that board as to the dutiable value of merchandise*, which is provided for by section 13, and is made conclusive against all parties interested.

The question sought to be reviewed in the circuit court in the case at bar does not relate to the dutiable value of merchandise, but is a question of law arising upon the construction of a statute, viz, whether the gauging charge formerly established by Rev. Stat., sec. 3023, is abrogated by the provisions of section 22 of the customs administration act of June 10, 1890.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

O

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 541.

IN RE GUSTAVE A. JAHN & CO.,

upon certain merchandise.

BRIEF FOR APPLICANTS.

Statement.

August 15, 1890, G. A. Jahn & Co. imported into New York some casks of molasses which, on the 28th of that month, they withdrew from warehouse and exported to Montreal, for the benefit of drawback. Upon said withdrawal and exportation, the collector exacted a charge of ten cents a cask for gauging said molasses, under R. S. § 3023. Jahn & Co. paid this exaction under protest that the charge for gauging was illegal, because abolished by the twenty-second section of the act of June 10, 1890. (26 Stats. 140.)

The board of general appraisers sustained the collector's action.

The U. S. Circuit Court reversed the board's decision, upon the ground taken in the exporters' protest. The

United States appealed to the U. S. Circuit Court of Appeals, assigning as one ground of error "that the said decision of the board" of general appraisers "was finnl and conclusive, and the circuit court had no jurisdiction to make any decree or order in said proceeding." Want of jurisdiction was not suggested in the circuit court, but (for the first time) upon appeal. (Rec. p. 1, fols. 1, 2 and 3.)

Upon these facts, the U. S. Circuit Court of Appeals certifies here this question ;—

"Whether the United States Circuit Court had jurisdiction to hear and determine the questions of law and of fact involved in the said decision of the board of general appraisers." (Rec. 2 top.)

Statutes.

This is the section of the Revised Statutes under which the collector made the exaction which is the subject of the suit of G. A. Jahn and Company ;—

"SEC. 3023. Upon all merchandise gaugeable by law, hereafter exported, upon which drawback or return duty is allowed, and upon all merchandise gaugeable by law, withdrawn from bonded warehouses for export, there shall be collected by the collectors of the several ports, ten cents per cask."

This is the language of the third section of the act of Mar. 2, 1867; the next section making the N. Y. gaugers payable by salary, provided their annual compensation "shall not exceed, in any fiscal year, the amount of *fees* earned by them." (14 Stats. 470, §§ 3 and 4.) This is now R. S. § 2741.

R. S. sec. 3024 requires, in similar language, the collection of three cents per cwt. for weighing; being § 1, act of July 26, 1866; the third section, in like manner, substitutes a salary for N. Y. weighers, not over "the amount of *fees* earned by them." (14 Stats. 289, §§ 1 and 3.)

The twenty-second section of the act of June 10, 1890, commences with this declaration;—

"SEC. 22. That all fees exacted and oaths administered by officers of the customs, except as provided in *this* act, under and by virture of existing laws of the United States, upon the entry of imported goods and the passing thereof through the customs, and also upon the entry of all domestic goods, wares and merchandise of exportation, be, and the same are hereby, abolished, and in case of entry of merchandise for exportation, a declaration, in lieu of an oath, shall be filed," etc., etc. (26 Stats. 140.) It concludes with a proviso, "that where such fees, under existing laws, constitute, in whole or in part, the compensation of any officer, such officer shall receive, from and after passage of this act, a fixed sum for each year equal to the amount which he would have been entitled to receive as fees for such services during the year." *(Ibid.)*

POINTS.

The full record of this case was filed in our application to have the cause certified to this Court, No. 1023 of Oct. Term, 1893.

I.

The question certified—

"whether the United States Circuit Court had jurisdiction to hear and determine the questions of law and fact involved in the said decisions of the board of general appraisers"—has been answered affirmatively at the last term of this Court in the case of

U. S. v. Klingenberg, 153 U. S. 101–4,

where, after full consideration, it declared that

"Under a proper construction of sections 14 and 15, it cannot be held that the right of review by the Circuit

Court is limited and confined, as contended by the appellee, to the two subjects of classification and rate of duty. . . The subjects of review by the Circuit Court, provided for by sec. 15, extend to *all* questions of law and fact in respect to which the board of general appraisers have appellate jurisdiction, except the decisions of that board as to the dutiable value of merchandise." (153 U. S. 104.)

Since this brief is prepared, we perceive the Solicitor-General admits that the question proposed by the Circuit Court of Appeals must be answered affirmatively.

II.

Has the Court of Appeals power to investigate or deny the Circuit Court's jurisdiction, upon the appeal of a cause there contested, without that question being therein suggested by either party, or by that court?

The question may be more fully and specifically stated, so as to include all its elements presented in the present case, thus;—

—Has the United States Circuit Court of Appeals, under the Act of 1891 creating it, authority and jurisdiction to inquire into the jurisdiction of the Circuit Court over a revenue cause brought before it in due form and by proper parties; and to declare that the Circuit Court had no jurisdiction to review and reverse the determination of the Board of General Appraisers, when the Circuit Court has asserted and exercised such jurisdiction, without any attempt, by either litigant or by the court, to have the jurisdictional question certified here, as provided by the fifth section of the act of March 3, 1891? (26 Stats. 827, bottom.)

Is the method of examining into and deciding the jurisdictional question, prescribed in that section, *exclusive* of all other methods in the subsequent proceedings, or upon appeal, of that very cause? This is independent of any question as to whether it might not be subject to collateral attack, upon this ground, by persons not party or privy to the original suit.

By reference to the full record before it (of which it takes cognizance) in No. 1023 of last term, the court will perceive that the question as to the legality of the exaction, was the only one presented to the U. S. Circuit Court. (See record in # 1023, p. 40; fols. 77 and 78.)

Its decision, that the exaction was illegal, and that the petitioners were entitled to have it refunded, was made January 7, 1892. (*Ib.* 35, fol. 61.)

Judgment was entered accordingly, January 12, 1892. (*Ib.* 37.)

Upon the ninth of February, 1892, the Attorney-General applied for, and was allowed, an appeal to the United States Circuit Court of Appeals; and on that day, in this last-named court, the U. S. Attorney filed as the "Third" of his assignments of error "that the decision of said Board as to said charges was final and conclusive, and the Circuit Court had no jurisdiction to make any decree, or render any judgment, relating thereto." (*Id.* p. 38, fols. 68–69: p. 40, fols. 77–78).

Could this, *then* and *there*, properly be made a ground of reversal?

In introducing this question into our brief it may be permissible to say, *arguendo*, that when the cause came on to be argued in the appellate court, it appeared to be the opinion of counsel for both parties that it must be answered negatively; and the oral argument was confined by them to the inquiry which was the only one considered below, viz.;—whether or not the payments were 'fees,' and as such abolished. The Court, however, *suo motu*, declared its purpose to certify to this Court the question of the jurisdiction of

the Circuit Court;—and petitioners' counsel then (erroneously, it seems) supposed the right of the Circuit Court of Appeals to enter into any inquiry as to such jurisdiction of the Court below was also to be certified; but, when the statement and certificate were prepared and presented, any purpose to certify this latter question was disclaimed, the Court declining to include it in the certificate, and striking it out of the draft submitted by petitioners' counsel.

The question necessarily confronts this Court, however, whether or not the U. S. Circuit Court of Appeals has any right or occasion to have answered the question it has certified here: if not, no answer will be given.

The statutory provisions touching this inquiry are found in sections 4, 5 and 6 of the act of March 3, 1891, c. 517, establishing these circuit courts of Appeals. (26 Stats. 827–8.)

The fourth section concludes:—

"and the review by appeal, by writ or error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established *according to the provisions of this act* regulating the same." (26 Stats. 827.)

"Sec. 5. That appeals or writs of error may be taken from * * * the existing circuit courts *direct to the Supreme Court* the following cases:

"In any case in which the jurisdiction of the court is in issue: in such cases the question of jurisdiction alone *shall* be certified to the Supreme Court *by the court below* for decision." . . . . . *(Ibid.)*

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the . . . existing circuit courts in all cases OTHER *than those provided for in the preceding section of this act, unless otherwise* provided by law, etc., etc. *(Ibid. 828.)* . . . .

This sixth section also allows

"that in every *such subject within its appellate jurisdiction* the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And *thereupon* the Supreme Court may either give its instruction on the questions and propositions of law certified to it . . . . or it may require that the whole record and cause may be sent up to it for its consideration," etc., etc. . . . . *(Ibid.)*

If an aggrieved party choose to appeal upon the question of jurisdiction, he may do so—but only to the Supreme Court.

The 'may' gives no choice of tribunals; but merely permission *so* to appeal.

Sec. 6 gives power to the Court of Appeals to review by appeal the final decision of the circuit courts "in all cases *other* that those provided for in the preceding section, *unless otherwise provided by law.*" (26 Stats. 828.)

This Statute confides in the Circuit Court, primarily, the power of determining its own jurisdiction. It is a power that must be so exercised, by any court. But, if either party disputes the jurisdiction, this act provides the *only* way in which the determination of this question can be reviewed. If it is not pursued, the decision of the circuit is final, upon *this* point. It does not become so by consent, tacit or express, but by the statute.

We are not unmindful of the principle that, generally, the jurisdiction of every court in rendering a judgment may be inquired into by any other tribunal before which that judgment is produced for its action thereon; but we also remember that the lower federal courts are of purely statutory jurisdiction, so *they have none by inference*, but only that which Congress *expressly* confers.

The right to *finally* settle the question of a court's jurisdiction must rest somewhere. As to this Court and its own authority, it rests here only. *Primarily*, it must be left to the decision of the court which is asked to exercise it. In cases not appealable, or in the ultimate tribunal, it must be finally determined therein. Where an appeal, *on that point*, is given it must be settled *in that court to which the appeal thereon is allowed.*

By this act of 1891, as this court expressed itself, "the appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction *distributed.*"

Lau Ow Bew, 144 U. S. 47.

No ground of common jurisdiction, no sharing of any authority, was prescribed. No option as to which court a suitor should resort for the determination of his appeal was given. He has an option as to what *question*, jurisdictional or other, he will make the basis of his appeal; but the exercise of this choice determines to which court he *must* present it.

It is a case in which the jurisdiction of the Circuit Court has been "*put in issue*" by a defendant that he can appeal that question here, after final judgment; then, he must elect whether to bring that question alone here, or the non-jurisdictional questions upon the merits before the Court of Appeals.

We assume Sec. 5 to mean that the question of jurisdiction must first be presented in the Circuit Court, by being put "in issue" there; otherwise this is a case where consent *will* give jurisdiction, as to that person and case, if that court asserts its right thereto. Jones v. Andrews, 10 Wall. 327.

If "in issue" it must be determined here upon an appeal. If none be taken, on that ground, the Circuit Court's decision is final upon it. By failing to present this "issue," a defendant cannot confer upon the Circuit Court of Appeals an authority the statute does *not*

give it; and do this by transferring the question (through inaction) from this court, to which it is expressly given.

McLish vs. Roff, 141 U. S. 661.
Chicago vs. Roberts, *Id.* 696.
In re Woods, 143 *Id.* 202.

We quote, *in extenso*, from an opinion of the U. S. Cir. Ct. of Ap. (VIII Circuit) per SHIRAS, C. J., sustaining our views;—

"The act of March 3, 1891, is to be construed reasonably, and in such a manner as to secure to litigants the rights of appeal, which it is clearly the purpose of the statutes to confer upon them. Is it not clear if one party should bring a case into this court [C. C. of Ap.] *upon errors affecting the merits of the controversy*, and, after the jurisdiction of this Court had attached, the other party should sue on a writ of error to the Supreme Court upon the question of the jurisdiction of the trial court, that the latter proceeding would not defeat the right of this court to hear, at the proper time, the errors assigned *touching the merits*; and, on the other hand, ought the fact that the one party had rightfully brought the case into this court on errors assigned *touching the merits* be allowed to defeat the right of the other party to *present the question of jurisdiction* TO THE TRIBUNAL WHICH THE STATUTE MAKES THE FINAL ARBITER OF SUCH QUESTIONS."

"All practical difficulties can be avoided by giving to each party the right to appeal to *the Court having jurisdiction of the question*, or questions, he desires to have reviewed; but when the appeals have each been perfected, and the rights of each litigant have in this respect been secured, then it will be for this court to determine whether it will allow a hearing before it until the question of jurisdiction has been adjudicated by the Supreme Court."

No. Pac. v. Glaspell, 49 F. R. 484–5.
Also in 4 C. C. Ap. 238, Sec. 144 U. S., 211.

III.

As to the merits of the litigation. R. S., §§ 3023–4, impose 'fees.'

If the sums paid under these sections of the Revised Statutes *(ante,* p. 2) are 'fees' for the weighing and gauging, it is undisputed that they were abolished by the act of 1890, § 22.

To retain this petty exaction, they are called 'charges,' and not 'fees' by the appraisers; being equally vexatious and burdensome under either name. When 'charges' were abolished, items known by that designation to the custom-house for nearly a century were simply there called something else, and still exacted. (116 U. S., 499.) This same course is pursued as to these fees.

'Charges' and 'fees' are sometimes synonymous. McPheeters vs. Morrill, 66 Maine, 124.

But here we have simply *fees.*

Whatever sum the law authorizes to be charged for gauging, or for weighing, is the *fee* for the service thus performed.

Some suggestion was made below that these were not 'fees,' because the identical money paid did not go into the pockets of the weighers and gaugers; but, primarily into the public treasury. R. S., Sec. 3687, refutes this theory. It speaks of sums so paid by customs-officers into the treasury as "*fees* paid into the treasury."

This mode of dealing with the fees of officers outside the customs-service indicates the same thing.

Thus, a district-attorney receives certain fees, *eo nomine;* makes a return of them, as such (R. S. § 833); but is forbidden to retain, above expenses, more than $6,000 a year. *(Id.* § 835.)

The sums turned over are as much 'fees'—especially with regard to the payer (for whose benefit this aboli-

tion clause was put into the act of June 10, 1890)—as are those pocketed.

So as to Clerk-of-court's fees *(Id.* § 839*)*; clerk of this court (22 Stats. 631); of the Land-office (R. S. §§ 2240–1; 1 Black, 56); consuls (R. S. § 1702.)

Whatever may be its ultimate destination, *the man who pays* realizes he is paying a fee; and everybody else speaks of, and considers, him as so doing. R. S. sec. 2741 measures the salaried compensation of *New-York* gaugers by "the amount of FEES earned by them":—will not every gauger at that port *rightly* claim to have sums paid for gauging done under sec. 3023 included, to make good his maximum of compensation?

As to U. S. gaugers everywhere, can they not *rightfully* claim to have these, their earnings, accounted "*as fees*" under the proviso of the act of June 10, 1890, § 22, abolishing fees, viz.;—

"*Provided*, that where such fees, under existing laws, constitute, in whole or in part, the compensation of any officer, such officer shall receive . . . a fixed sum for each year, equal to the amount which he would have been entitled as *fees* for such services during said year." (22 Stats, 140, middle.)

Judge Wheeler, in his opinion (Rec. of # 1023 of last term, pp. 35, 36) traces these sections of the revision back to their origin in the acts of 1866–7, where they are recognized as 'fees,' and pertinently adds:—

"But the point is not whether they are *called* 'fees' in the statute:—the point is whether they *are* 'fees' within the meaning of this act; § 22, act of 1890." *(Ib.* 36.*)*

By all contemporary construction of the Treasury Department and of the custom-house, these always were, and still are, treated as 'fees'—as our record in last term's case abundantly shows. (Same record, pp. 5 to 33.)

If the question were doubtful—which we can hardly imagine it to be—such uniform and long-continued construction would be persuasive as *indicating the thing which Congress proposed to abolish.* U. S. v. Hill, 120 U. S. 182, which is a case determining what are a clerk's 'fees.'

Referring to the corresponding internal-revenue legislation (117 U. S. 488) we find the gaugers in that service compensated by 'fees' payable to the *collector* and only so accounted for to the gauger that *he* shall receive but $3,000 a year, however much the government obtains from the distillers. (Act July 20, 1868, c. 186, § 53 in 15 Stats. 157; R. S. §§ 3156-8.)

It would be anomalous legislation that would treat the pay for internal-revenue gauging as 'fees,' and that for customs' gauging as not fees!

Upon the merits, the cause is too clear for argument; we only try to call the court's attention to this that those burdened with these illegal and abolished fees may not be overslaughed, without having the merits judicially declared.

If the United States Circuit Court of Appeals, and this Court, should have allowed the preposterous ruling of the Board of General Appraisers—made *ex parte*, in the dark, without any chance for a real hearing of the merits—to stand, by declaring a lack of jurisdiction in the Circuit Court to review and reverse it, and give no expression upon the merits, the export of foreign-made goods would have continued to be indefinitely burdened with fees which Congress intended to abolish, until that body could be induced to repeat its declaration upon this subject; perchance, to have its will again frustrated by some absurd administrative mis-construction of plain provisions; but we understand that the decision made at the last term of this court prevents our being exposed to such unlawful exactions without legal redress.

U. S. v. Klingenberg, 153 U. S. 104.

The Solicitor-General's concession of the point reaches us after this brief is prepared.

The matter is so serious to exporters, that this brief is filed the more strongly to enforce the propriety and the necessity of the construction thus declared; and in the hope of obtaining some decision upon the subject of the U. S. Circuit Courts of Appeals' right to investigate, upon appeal, the jurisdiction of the Circuit Court over the very case appealed.

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